No. 2626

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINERS & MERCHANTS BANK, a corporation,
Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

JOHN W. ROBERTS,
GEORGE L. SPIRK,
WILLIAM H. METSON,
Attorneys for Plaintiff in Error.
1304 Alaska Bldg., Seattle.

METSON, DREW and MACKENZIE,
of Counsel.

Alaska Printing Co., Seattle's Brief Printers, Alaska Bldg. Main 7398

No._____

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINERS & MERCHANTS BANK, a corporation,
Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

JOHN W. ROBERTS,
GEORGE L. SPIRK,
WILLIAM H. METSON,
Attorneys for Plaintiff in Error.
1304 Alaska Bldg., Seattle.

METSON DREW and MACKENZIE,
of Counsel.

Alaska Printing Co., **Seattle's Brief Printers,** Alaska Bldg. Main 7398

No._____

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINERS & MERCHANTS BANK, a corporation,
Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

STATEMENT.

Miners & Merchants Bank, a Washington corporation of Seattle, was at all times herein named,

operating a bank at Ketchikan, Alaska. The officers and owners were citizens and residents of Seattle.

United States Fidelity & Guaranty Company for compensation was engaged in writing fidelity bonds.

The bank was opened about May 1st, 1906, with Mack A. Mitchell as cashier. The Fidelity Company solicited the business of the bank, and as a result wrote fidelity bond guaranteeing the bank against loss on account of Mitchell, and so continued to write the bond until the time of the discovery of defalcations on the part of Mitchell.

The bank contends that the insurance was one continuing suretyship; that it was all one contract of insurance continued in force from the time of the opening of the bank until the discovery of the loss.

The Surety admits writing the bond for eight consecutive years, and the receipt of premiums for that period. It denies that the insurance was in force at the time of the discovery of the losses for two reasons:

First: It contends that each renewal or continuation of the guarantee was a new and independent contract, and discovery was not made within six months.

Second: That the last extension was obtained

through fraud of the bank.

The bank asserts:

First: That it gave this insurance to the company at its solicitation and under express agreement made by Surety as an inducement to procure the business, that it would from time to time, and before the expiration of the year, renew and continue in force this insurance. The bank to be at no pains, cost or expense from time to time, except to pay the premiums.

Second: That in pursuance of that agreement, the company did continue in force the insurance until after the discovery of loss.

Third: It denies that the last continuation was procured through misrepresentation.

The Surety before suit denied liability upon the sole ground that the acts of Mitchell did not constitute a breach of the conditions of the bond.

The cause came on for trial before a jury. The jury was duly empanelled, and counsel for each side made opening statements. Tr. pp. 65 to 75, and 75 to 86.

Thereupon counsel for Surety made the following motion:

"MR DOVELL: If the court please, I think we

can very materially abbreviate this hearing, if the court will hear two motions, which I have to present at this time. Having in mind the pleading and the opening statement of counsel, I move to exclude the testimony touching any alleged loss occasioned by any wrongful acts or conduct of Mack A. Mitchell, occuring prior to April 1st, 1912, for the reason that it appears from the complaint that no discovery of said alleged loss, or wrongful acts or conduct was made within six months from April 1st, 1912, the same being the date of the expiration of the bond and renewal, dated April 1st, 1911. And I also move to exclude any testimony touching any alleged loss occasioned by any wrongful acts, or conduct of Mack A. Mitchell occurring prior to April 1st, 1913, for the reason that it appears from the complaint that no discovery of said alleged loss or wrongful acts or conduct was made within six months from April 1st, 1913, the same being the date of expiration of the bond and renewal dated April 1st, 1912." (Tr. pp. 86, 87).

This motion was made at a time when the case was ready for the introduction of testimony but before any was offered. The Honorable Trial Court sustained the motion of counsel for the Surety, and in doing so used the following language:

"So that I think this motion must be granted with relation to that old bond, and any recovery under the old bond, or for any sort of misconduct that was sought to be insured against in the old bond, I think will have to be disregarded, and we will have to proceed here, and determine what are the facts with relation to what was the new bond, and whatever that would culminate in, that can be recovered. But I think the other is clearly not proper to be submitted. I will frankly state to

you now, while it is not here, I have very serious doubts in my mind whether or not those renewal bonds are separate and distinct obligations, and that the rights of the parties to recover must be regulated with that in view, even though they are renewals, because it contains the same terms and conditions as the old contract, but it is a new contract." (Tr. p. 117).

Counsel for Surety then offered to allow judgment to go against it in favor of the bank for $688.27 on account of so-called "last bond." Whereupon, the bank, made offer to prove all the allegations of its complaint.

"MR ROBERTS: Now, I desire, if the Court please, to offer at this time to prove that the renewal, or so-called renewal, or what is called by counsel the last bond, was given as a renewal, and was, as a matter of fact, a continuation of the contract of insurance and one of the continuations by renewal from year to year from 1906, and that it was agreed between the Miners & Merchants Bank and the United States Fidelity & Guaranty Company that said contract of insurance should be continued and renewed from year to year, and that the bond or instrument dated April 1st, 1913, was executed and delivered as a renewal and continuation of the former contract of insurance; and to prove all the allegations of plaintiff's complaint."

"MR. McCLURE: That proof will be by parol? Your proof will be oral and not written?

"MR. ROBERTS: I have both written and oral evidence to prove that fact.

"MR. DOVELL: To that we will object upon

the ground that all negotiations between the parties were merged in the various written contracts set forth in the complaint, and any testimony of the character suggested by counsel would be an attempt to vary, enlarge or change contracts complete and unambiguous in their terms.

"THE COURT: I take it that this offer is now in harmony and in support of the statements made to the jury in the opening statement as to the manner in which these matters would be established?

"MR. ROBERTS: And the statements made to Your Honor this morning in open Court, and in the pleadings.

"THE COURT: Yes. All right. The objection to the offer will be sustained. The offer is denied.

"MR. ROBERTS: And an exception allowed.

"THE COURT: Yes. Judgment will be entered in favor of the plaintiff for the amount stated. Exception allowed." (Tr. pp. 120 to 122).

Rejected offers must be considered as proven.

Miller v. Maryland Cas. Co., 193 Fed. 347.

The Court then entered judgment against the Surety Company for $688.27 on acount of loss under the last renewal.

The bond as originally written contains the following in regard to loss: "And which shall have been committed during the continuance of said term, or of any renewal thereof and discovered during said continuance or any renewal thereof, or within six months thereafter."

It is stated in the pleading, and admitted in opening statement, that the first discovery of loss made by the bank was on December 9th, 1913. From year to year a continuation contract was issued by the Surety. It did not write a new *bond* each year. It took no new application; no new statements or representations, but issued only the continuation as follows:

"IN CONSIDERATION OF THE SUM OF ONE HUNDRED ($100.00) DOLLARS, THE UNITED STATES FIDELITY AND GUARANTY COMPANY hereby continues in force Bond T-450 in the sum of Twenty-five Thousand ($25,000) Dollars, on behalf of MACK A. MITCHELL in favor of MINERS AND MERCHANTS BANK of Ketchikan, Alaska, for the period beginning the 1st day of April, 1910, and ending on the 1st day of April, 1912, subject to all the covenants and conditions of said original bond heretofore issued, dating from the 1st day of April, 1906." (Tr. p. 28)

Only one was put into the record, it being admitted in the pleading that all were of the same tenor and effect, differing only in date, to April 1st, 1913. The contract was further continued in force by the instrument (Tr. pp. 29 to 31). This document bears the date to which the prior continuation carried the insurance, and *continued without any date of termination,* being a continuous contract of insurance unless terminated by notice. The discovery by the bank was not within six

months from April 1st, 1913, and the Surety asserts that its liability fully terminated on October 31st, 1913, because:

(a) The last instrument was not given as a continuation or renewal.

(b) If given as a continuation, it was procured through misrepresentation by the officers of the bank.

December 9, 1913, the bank served upon the Surety written notice. (Tr. pp. 31 to 33). This was in the nature of a preliminary notice, stating that matters had come to its attention which led it to believe that a loss had been sustained. That it was sending immediately to Ketchikan, an expert accountant, and would upon his return, place before the Surety all the facts which he obtained.

December 17th, the bank served upon the surety further written notice and demand, setting forth the nature and extent of the losses. In due course the Surety contended that the facts disclosed, did not show a loss covered by the bond in that they did not make out a case of larceny or embezzlement.

The execution and delivery of all the documents referred to stand admitted in the pleadings. The receipt of the premiums for eight consecutive years is admitted.

On the question of continuous insurance the complaint alleges:

"That the said defendant held out to the plaintiff, its officers and agents, as an inducement to be allowed, for a consideration and an annual premium to be paid by the plaintiff to the defendant, to write said fidelity bond, * * * that it would from time to time and from year to year cause said bond to be renewed, continued and extended without any additional cost, expense, trouble or annoyance to the plaintiff or its officers, except the payment of the annual premium, and would keep said bond in force and renewed, continued and extended." (Par. IV. Tr. pp. 3, 4).

"That the said defendant, United States Fidelity & Guaranty Company, as a further inducement to this plaintiff to place the insurance of its cashier with defendant, and as a part consideration for the premium to be paid by the plaintiff to the defendant, stated and represented to this plaintiff and agreed to and with the plaintiff that the defendant was in a position to give and would give to the plaintiff at all times while said insurance or any renewal or extension thereof were in force, the very best of service and the very highest grade of insurance to be had in that line of surety and fidelity insurance, and that if there should be any changes, alterations, amendments or improvements in the form of the bonds to be written and executed to banks or bankers indemnifying or insuring such bank or bankers agaist loss by or through their employes, that the said defendant would at all times furnish to plaintiff such improved or changed form of bond." (Par. V, Tr. pp. 4, 5).

"That the plaintiff, relying upon said representation, statements and agreements and at the earnest solicitation and request of defendant, United

States Fidelity & Guaranty Company, did on or about the 1st day of May, 1906, pay to the defendant, United States Fidelity & Guaranty Company, the sum of $100, as the annual premium." (Par. VI, Tr. p. 5).

"And during the period named in said bond *and continuing in the sum of $25,000, until said insurance should be terminated,* and did expressly agree to indemnify the plaintiff against any and all pecuniary loss that might be sustained by the bank by reason of the fraud or dishonesty of the said Mack A. Mitchell in connection with the duties of his office or position amounting to embezzlement or larceny, and which should have been committed during the continuance of said insurance or any renewal thereof." (Par. VII, Tr. pp. 6, 7).

"That prior to the expiration of said bond the same was renewed and continued in force, and extended by the defendant, United States Fidelity & Guaranty Company * * * its representatives and agents, and by reason of the original agreement and understanding under which said insurance was written and through and under which said defendant corporation, by its duly authorized representatives, agreed at all times to keep this plaintiff fully indemnified," etc. (Par. VIII, Tr. p. 7).

"That the defendant corporation continued to renew said surety and fidelity agreement from year to year and until the 1st day of April, 1914, and that plaintiff did, for each year, pay the defendant corporation in advance its annual premium, and the defendant corporation did during each year receive and accept said annual premium * * * and the said defendant surety company did at all times continue to renew its agreement of insurance and indemnity to this plaintiff as against the said Mack A. Mitchell, and any and all loss on account

of wrongful acts of said Mack A. Mitchell, and said insurance was at all times kept in full force and effect." (Par. IX, Tr. pp. 7, 8).

"That on the 1st day of April, 1913, the defendant, United States Fidelity & Guaranty Company, made, executed and delivered to the plaintiff a certain bond in writing, a copy of which is hereto attached marked Exhibit "C" and made a part of this complaint. That said bond was given by the defendant corporation to the plaintiff bank by, through, under and in pursuance of the original agreement and contract indemnifying and insuring said bank as hereinabove stated and as a part of the same transaction. That said bond was and is in the sum of $25,000, and was made for a period of one year from the 1st day of April, 1913, and is still in full force and effect. That the plaintiff paid to the defendant and the defendant received and accepted from the plaintiff as consideration for said execution, renewal and extension of said bond the sum of $62.50, and then and thereby said insurance agreement and contract was extended and continued in full force and effect until the 1st day of April, 1914." (Par. X, Tr. pp. 8, 9).

"That as a consequence of said contract of insurance and in consideration of the payment of the said annual premiums by plaintiff to defendant, the plaintiff was, and has been and is insured and indemnified by the defendant and indemnified and insured by defendant against any and all loss or damage which the said plaintiff should, on account of said Mack A. Mitchell, sustain * * * and during the period named in said contract of insurance *and continuing in the full sum of $25,000,* and until the termination of said insurance, which is still in force and has since April 1st, 1906, been insured against all wrongful acts," etc. (Par. XI, Tr. pp. 9, 10).

"But the plaintiff at all times relied solely and wholly upon the promise and representations of the defendant and its duly authorized agents, and at all times depended solely upon the assurance of defendant and its representatives that plaintiff was fully insured against any loss, harm or damage on account of any of said wrongful acts of the said Mack A. Mitchell and left the matter of the continuation and renewal of said insurance and of giving the plaintiff at all times the best insurance to be had entirely to the defendant and its representatives and agents." (Par. XVII, Tr. pp. 14, 15).

"That during all of the period hereinabove named the defendant charged the plaintiff for said contract of insurance on account of the said Mack A. Mitchell, the highest premium charged or collected by any other surety or fidelity company doing business within the State of Washington or the Territory of Alaska, and did during all of the eight consecutive years charge and collect from this plaintiff the full premium charged by any and all of the most substantial and responsible insurance companies doing business within the territory or state named, and did at all times charge this plaintiff and collect and receive from this plaintiff during said entire period the premium charged for the best, most modern and up-to-date insurance of that character to be had from any surety company, which premium was at all times paid by plaintiff upon and under the agreement and understanding that it was receiving at the hands of defendant at all times the most modern and up-to-date policy and insurance of that kind or character to be procured." (Par. XVIII, Tr. p. 15).

"That the plaintiff bank has at all times since it entered into the contract of insurance with the defendant fully complied with all the terms, condi-

tions and provisions of said contract of insurance, and has fully kept and performed all the terms conditions and provisions of said contract of insurance by it to be kept and performed. That it has fully and promptly paid all premiums, and since the discovery of said wrongful acts and conduct on the part of said Mack A. Mitchell, has fully complied with all the terms and conditions of said contract of insurance on its part to be kept and performed." (Par. XXI, Tr. p. 17).

The continuations were by allegations, made a part of the complaint, and are admitted by the answer. A copy of one of them has been copied into this brief and is found on page 28 of Transcript.

The bond is likewise, made a part of the complaint, and contains the following:

"It is hereby understood and agreed that those representations and such promises, and any subsequent representation or promise of the Employer," etc. (Tr. p. 21).

"NOW, THEREFORE, THIS BOND WITNESSETH, That for the consideration of the premises, the Company shall, during the term above mentioned, *or any subsequent renewal of such term.*" (Tr. p. 22).

"*And which shall have been committed during the continuance of said term, or of any renewal thereof,* and discovered during said continuance or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said Employe from the service of the Employer within the period of this Bond, whichever of these events shall first happen; the Company's total liability on account

of said Employe under this Bond or any renewal thereof, not to exceed the sum of TWENTY-FIVE THOUSAND ($25,000) DOLLARS." (Tr. p.22)

"It being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, *unless otherwise stipulated between the Employer and the Company.*" (Tr. p. 26).

We claim it was "otherwise stipulated" between bank and surety.

The notices served on the bank were made exhibits to the complaint and a part thereof.

In Exhibit "D" the following allegation was made:

"Your bond was in the amount of Twenty-five Thousand Dollars ($25,000), and has been renewed each succeeding year, including the year 1913, the bond for the year 1913 bearing date of April 1st, 1913, your bond having been continuously in force in the same amount since the said 1st day of May, 1906." (Tr. p. 31).

The Surety, by answer, put in issue the facts alleged as to the loss, and the nature and character thereof and the allegations as to the contract for continuation and extension, and denied generally liability.

It pleaded affirmatively:

First: That no breach of the bond was dis-

covered until December 9th, which was more than six months after April 1st, 1913.

Second: That the continuation of April 1st, 1913, had been procured from the company by misrepresentations on the part of the plaintiff bank in that the officers of the bank had knowledge of the wrong doing of Mitchell at the time said contract was executed; that they having discovered Mitchell's defaults, had, in November, gone to the Surety and by concealing the knowledge which they had, induced the Surety to execute the continuation as of April 1st, 1913, so as to avoid the six months forfeiture clause.

Third: That the bank had agreed at the time of the issuance of the bond, and at the time of the various extensions thereof, and as a condition of the issuance of said bond and the various continuations thereof, that the bank would from time to time make new and proper examination of the books and accounts of Mitchell, and that the bank had wrongfully failed and neglected to make these examinations from time to time. That the bank was therefore estopped to recover because of said breaches of warranty.

Bank in its reply denied generally the affirmative matters, and denied that it had procured the last renewal and continuation to be executed as of

date of April 1st, 1913, through fraud or misrepresentation, and made in reply the following allegation:

"That said bond marked Exhibit "C" and attached to the complaint of plaintiff was written and delivered by said defendant to the plaintiff as and of the 1st day of April, 1913, in pursuance of the agreement and arrangement between the parties hereto for the continuance in force of said fidelity insurance to plaintiff, as, for and on account of the said Mack A. Mitchell, as cashier of plaintiff bank, and was and is a continuation of said fidelity insurance and contract. That same was written and delivered by the defendant to plaintiff as a part of and in pursuance with the agreement and arrangement existing between the parties hereto, as fully set forth in the complaint herein, and for the consideration of the premiums paid and without any further or additional application having been made therefor." (Tr. pp. 53, 54).

Bank in its reply admitted that there was a delay on the part of the Surety in renewing the bond, but alleged that the delay was caused by the Surety itself, and was through its own neglect. That upon the delay being called to the attention of the Surety it admitted that the delay was its own fault and neglect, and immediately recognized and admitted that it had agreed to continue said insurance, and did thereupon immediately continue same by the renewal as of date of April 1st, 1913. Bank further alleged that the Surety did at the proper

time for the renewal, forward same to Mitchell at Ketchikan, and that Mitchell returned it to the Surety saying that he did not care for further continuance. That Mitchell at all times concealed this fact from the bank. That the bank, without any knowledge that the Surety had taken the matter up with Mitchell instead of with the bank, at all times believed the bond had been renewed and relied wholly upon the fact that the Surety had agreed to keep the insurance renewed, and had no knowledge that it had not been renewed. The bank denied that it had breached any warranty, and denied that it had ever executed any application or had made any statement subsequent to May, 1906. (Tr. pp. 54 to 58).

Counsel for bank, in opening statement to jury, stated:

"This bond was renewed from year to year. We allege, and expect the evidence to show to you, that the arrangement and agreement was made at the time the bond was written, that the agents of the surety company should, from year to year renew the bond. The company did renew the bond from year to year, each time renewing it before the expiration of the year, *and that the bond continued in force until after the occurrences for which the action is brought.*" (Tr. p. 67).

"The bond was first written in 1906, and renewed each successive year, including the year 1913, and until April 1st, 1914, and the premium paid

to the company by the bank. The bank paid that premium, not Mr. Mitchell. The bank procured the bond itself, and paid the premium." (Tr. p. 74).

Counsel for Surety, in his opening to the jury stated:

"They sent him up there, and armed him with full authority to conduct the business of that bank at Ketchikan, and during all the time he was there, from 1906 until 1913, made, I believe, but one examination of his accounts, and that was in the early part of his regime there. Such was the trust and confidence they had in him. In 1906 the defendant surety company was represented in Seattle by Calhoun, Denny & Ewing." (Tr. p. 76).

(The authority, therefore, of Calhoun, Denny & Ewing stands admitted in the record).

"Some short time before 1913 we changed our agent here, and the new agent, a Mr. McCollister, left the Alaska Building and took up his quarters in the Hoge Building." (Tr. p. 78).

"We followed the usual custom as we do with all bonds—our agents sent them the usual notice that their bond was about to expire." (Tr. p. 78).

"The notice was received, of course, by Mr. Mack Mitchell himself, who was the only one in the bank at Ketchikan. He, thereupon, notified us that they did not desire a renewal of the bond." (Tr. pp. 78, 79).

"Then in November some time they come to us and say, 'How is it that that bond was not issued in April? We wanted that bond.' Of course they

had not paid any premium for any bond, but they said, 'We want that bond, and will you kindly write it, and date it back to April 1st?'" (Tr. p. 80).

Counsel for Surety in his argument, stated:

"Your Honor will not fail to understand why they sought to get this last bond; *they thought it would operate as a renewal of the old bond.*" (Tr. p. 92).

Counsel for bank in his argument to the court, stated:

"While counsel has not fully stated it, he has probably understood our contention, in that we contend this is one continuous insurance." (Tr. p. 99).

"We expect to show that it was the arrangement between these parties that this should be renewed—that the company would keep it renewed, and that it did keep it renewed, and that counsel is mistaken when he says that we would apply each year for that renewal." (Tr. p. 100).

"Then, we will offer evidence to show, that it was not ourselves who made the discovery that this was not renewed, but that it was made by the old agent of the company, who then went to this company, and asked them—called their attention to it, and they then agreed with him that it should be renewed, and he went to the bank, and asked them if they knew this bond had not been renewed. That is the way we got the information. The bank had depended solely upon the surety company to keep it renewed. No application had been given. It is the absolute requirement of this company and of

all the companies, that upon the execution of a new bond, a written application must be given. None was taken in this case. The company treated it as a renewal and dated it as a renewal—dated it as of the date they should have renewed it originally. Now, so much for those questions, all of which are questions of fact for the jury." (Tr. pp. 100, 101).

"Because of the fact that it was in pursuance of the original arrangement and agreement, which existed between us, and because of the fact that that is what we asked them to do, and because as and for a renewal, that is the bond which they gave us." (Tr. p. 105).

"Now, if that were not a renewal, what explanation can be offered for the dating of it back? If that were a new contract—a new bond—it would have to have been dated on the date it was executed." (Tr. p. 106).

"They had done all the business here; they had been paid all the premiums here; for eight years, they collected these premiums. They had collected these premiums for eight years. They had done all the business here. They, themselves, renewed the bond from year to year without any action on the part of the bank. The bank had relied upon them from year to year. And, as I said, had not the agency been changed, this difficulty would never have arisen." (Tr. pp. 109, 110).

"And then, when the bank discovered it, which, as I said, was discovered through the old agency, and not on its own account, they asked for a renewal of that bond, and they are given this other

bond. * * * And they gave that bond, then, as a renewal or a continuation of this contract of insurance." (Tr. p. 110).

"The bond they gave to us as a renewal was the bond they were giving then to all persons—the bond they were giving to any one who made application for like insurance. I can see no difference, if the Court please, whether they had given us one of these certificates, or whether they gave us, in lieu thereof, the other paper, which is now referred to as the new bond. We want the privilege of showing that they agreed to give it to us as a renewal and that they did give it to us, as a matter of fact, as a renewal, and we want to submit that question of fact to the jury; first, that they agreed to give it to us as a renewal; second, that they did give it to us as a renewal of this insurance, and as a continuation of the insurance which we had had, and carried, and paid them for, for eight consecutive years." (Tr. pp. 110, 111).

"But certainly, certainly, if we can prove that they agreed to renew this old contract, and that they did renew this old contract, the form of the renewal is immaterial." (Tr. p. 115).

"So, as I said, I think it would certainly not be advisable for the Court to undertake at this time to say in advance of the offering of any testimony that we would not be permitted to offer any testimony in relation to the renewal of this contract." (Tr. p. 115).

Counsel for bank then made offer to prove all its allegations, and to prove as a fact that the Surety had agreed to continue the bond, and that it was so continued. (Tr. pp. 120, 121).

The decree entered by the Honorable Trial Court contained the following:

"THEREUPON, Counsel for the plaintiff asked permission to be allowed to prove and made offer to prove the fact, that the bond of April 1st, 1913, was a renewal bond and given in pursuance of previous arrangement and agreement for the continuation of the insurance and as a renewal and continuation of the former bond, and to prove the allegations of its complaint." (Tr. p. 61).

Motion for new trial was filed, duly heard, and overruled, and exception allowed. (Tr. pp. 62 and 64).

No evidence of any kind was received by the Honorable Trial Court. No admissions of counsel were made, except as have been hereinabove copied. The Trial Court refused to hear any testimony and decided the whole cause as a matter of law.

All statements made by counsel either to the jury or to the Court, except arguments upon law, have been made a part of the record.

SPECIFICATION OF ERRORS.

The Honorable Trial Court erred:

1st. In granting the motion made by Surety to exclude all testimony on behalf of bank, except as it related to loss under the instrument of April 1st, 1913.

2nd. In excluding all testimony touching any alleged loss occasioned by any wrongful act or conduct of Mitchell occurring prior to April 1st, 1913, or April 1st, 1912.

3rd. In refusing to allow bank to offer proof to sustain the allegations of its pleadings, and in refusing to allow bank to introduce evidence to establish the facts which it offered to prove.

4th. In refusing the offer of testimony on behalf of bank to prove the allegations of its complaint, and that the bond was at all times during the periods named, as a fact, renewed and continued in force, and in refusing to allow bank to prove that it was agreed that the instrument of April 1st, 1913, was a continuation and renewal of the bond, and that it was, by agreement between the parties, to be and was at all times a continuation of the surety contract, and was so understood and treated.

5th. In refusing to allow bank to prove as a matter of fact that it had an agreement with the defendant Surety that the bond and contract of suretyship was to be by the Surety continued in force, and that it was to be from time to time within the year renewed, and in refusing to allow bank to prove as a question and matter of fact that said instrument, called by the Surety, the last bond, was given in pursuance of said contract.

6th. In overruling motion of bank for new trial, and in refusing the bank a rehearing and retrial in the cause.

7th. In refusing and denying to bank a trial of the issues of fact raised by the pleadings.

8th. In entering final judgment in the cause, and in entering judgment for the bank only in the sum which the Surety was willing to admit on account of the so-called last bond, and erred in entering final judgment in favor of the defendant against the plaintiff, and erred in not hearing the evidence and entering the final judgment for the bank for the full amount prayed.

ARGUMENT.

"The object of an indemnity bond is to indemnify, and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as actual security and misleading as a pretended one."

Bank of Tarboro v. Fidelity etc. Co., 83 Am. St. Rep. 682.

"Courts have always set their faces against an insurance company which having received its premiums, has sought by technical defense to avoid payment."

Mutual Life Ins. Co. v. Hill, 193 U. S. 551.

In the statement we have quoted copiously from the pleadings and statements of counsel, be-

cause the decision was based wholly thereon.

We assume that no statement of counsel may properly be considered, except in so far as same is an admission.

Counsel for Surety stated that Mr. Ed Chilberg was the head of the bank and that certain things took place with him. (Tr. pp. 79, 80).

Counsel for the bank stated that Mr. Ed Chilberg was not an officer of the bank, nor a Trustee, nor connected in any way with it or its management until November 29th, 1913. (Tr. p. 66).

Such statements present only issues of fact.

CONTINUATION OF SURETYSHIP.

The bond expressly provides for renewals. It says: "such promises and any subsequent representation." That the company "shall, during the term above mentioned, or any subsequent renewal of such term." "Which shall have been committed during the continuance of said term, or of any renewal thereof and discovered during said continuance or of any renewal thereof, or within six months thereafter." That the liability on account of the bond "or any renewal thereof," was not to exceed $25,000. (Tr. pp. 21, 22).

Then, from year to year, in consideration of

the premium, it executed an instrument which, *"hereby continues in force"* the bond.

We desire to call the attention of the court upon the threshold of this argument, to the fact that in none of the cases cited by counsel below, and upon which the Trial Court must have relied, does the renewal certificate contain the words: "hereby continues in force." The continuation certificate which Your Honors must here consider, is different from any found in the earlier cases, and as stated by one of the courts of last resort, was undoubtedly put out to meet the objections of the earlier cases, and to be a certificate which does constitute a continuance of the insurance contract.

U. S. Fid. & Guar. Co. v. Citizens Nat'l. Bank of Monticello, 143 S. W. 997.

U. S. Fid. & Guar. Co. v. Shepherds Home Lodge, 174 S. W. 487.

First National Bank v. U. S. Fid. & Guar. Co., 110 Ten. 10, 100 Am. St. Rep. 765.

U. S. Fid. & Guar. Co. v. First Nat'l Bank of Dundee, 233 Ill. 475, 84 N. E. Rep. 670.

Alex Campbell Milk Co. v. U. S. Fid. & Guar. Co., 146 N. Y. Sup. 92.

North St. Louis Bldg & Loan Asso. v. Obert, et al, 169 Mo. 507, 69 S. W. 1044.

Am. Credit Indemnity Co. v. Athens Woolen Mills, C. C. A., 92 Fed. 581.

Am. Credit Indemnity Co. v. Champion, C. C. A. 6th Circuit, 103 Fed. 609.

Fid. Cas. Co. v. Fechheimer, 220 Fed. 401.

The cases cited by counsel, except one, appear to be based upon and to follow the case of *De Jernette v. Fidelity Casualty Co.,* 33 S. W. 828. That case has been twice overruled, and disapproved in two subsequent decisions in the same court. Furthermore, the court in 143 S. W. says, that the provisions of the bond of the U. S. Fid. & Guar. Co. are different from the provisions of the bond of the Fid. & Casualty Co. which was construed in the *De Jernette* case.

We quote from *U. S. Fid. & Guar. Co. v. Bank of Monticello,* 143 S. W. 997:

"Appellant contends that the bond executed March 15, 1904, and each continuation certificate executed annually thereafter, to March 15, 1908, constituted separate and independent contracts, and that therefore the bank must allege and prove the loss occurring under each of them, and that the rights of the parties should be determined as to rules of notice and time of action in accordance with this theory. If this contention is correct, then appellee could not recover for any embezzlement or larceny committed by the cashier, except those committed during the life of the last contract, as the time given, to-wit, six months, for the discovery of the fraud, had expired on all the contracts but the last. Appellee, on the other hand, contends that the original bond and the four certificates constitute one continuous contract, and the lower court so held and rendered a judgment against appellant for $15,000 only, as that was the full amount of the indemnity under the contract. Appellant refers to the case of *De Jernette v. Fid. & Casualty Co.,* 98 Ky. 558, 33 S. W. 828, 17 Ky.

Law Rep. 1088. *This court did hold that the bond and renewals in that case were separate contracts; but upon a close examination of the facts of that case and those in the case at bar, a difference will be found.* It is reasonable to presume that, because of the construction placed upon the contract in the *De Jernette Case,* that portion of the public wanting indemnity insurance required a different contract, *as it seldom occurs that embezzlement or larceny is detected within three, six or twelve months* after committed, especially if the employe has been in the service of his employer for some time and is trusted by him and is shrewd. Therefore, in order to obtain business, the indemnity and guaranty companies gave them a contract which would protect them.

"As stated, the bond in question was issued March 15th, 1904, and the bank paid the premium, $45., at that time. Appellant agreed in the bond to indemnify the bank in the sum of $15,000 against any loss it might sustain at the hands of its cashier by any acts of his which amounted to embezzlement or larceny, for the term of twelve months, provided his wrongdoing was discovered within six months from the time the contract expired. If the bond and four renewal certificates contained only these stipulations, then appellant's contention is correct, and the case would be governed by the *De Jernette Case; but we are of the opinion that the facts of this case show that the parties intended that the bond and four continuation certificates should constitute one continuous contract.* In the original bond this language is used: 'The company shall, during the term above mentioned or any subsequent renewal of such term, * * * make good and reimburse to the said employer, such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employe in connection with the duties of his office or position, amounting to embezzlement or larceny, and

which shall have been committed during the continuance of said term or any renewal thereof, and discovered during said continuance or any renewal thereof or within six months thereafter.' Similar language is used throughout the bond, and we are unable to understand why. If the bond was intended by the parties to have no connection with any other, why was this language used? For what was it inserted? It appears from this language that appellant was obligating itself in the sum of $15,000 to pay the bank for any embezzlement or larceny committed by its cashier, not only from March 15, 1904, to March 15, 1905, but to any period that might be fixed by any renewal of the contract." 143 S. W. 998.

Statement in the syllabus is as follows:

"HELD, that the original bond and certificates of renewal constituted but one contract, and the bank could recover for any loss sustained during the period of the bond and renewal certificates, *and discovered within six months after the expiration of the last certificate.*" Syllabus, 143 S. W. 997.

This case also holds that the question of whether or not the bank had acted with due diligence and promptness in making examinations, etc., was one for the jury. It likewise contains a discussion of what constitutes larceny and embezzlement as used in such bonds, and it is held that to conceal overdrafts is such fraud or dishonesty as amounts to larceny or embezzlement.

This case likewise contains the following statement:

"At the time appellant issued this insurance, it knew that the bank was what is called 'a country bank,' and that the officers of it were men who, probably, could not give the accounts an expert examination, and it is presumed that it understood the answer to the question to mean that they would give the accounts the best examination they could." 143 S. W. 999.

United States Fidelity & Guaranty Company v. Shepherd's Home Lodge No. 2, 174 S. W. 487, also same company and same bond, except as to time.

"During the continuance of said term or of any renewal thereof, or discovery during the said continuance or within *three* months thereafter."

The statement of the law in the syllabus is as follows:

"The contract was a continuing one, and the recovery of the lodge upon the bond was not limited to the loss occurring after the last renewal, but included the total loss from the inception of the contract up to the limit of the guaranty."

The provisions of the bond seem to be identical with the one at bar except that three months was inserted for six.

"We are unable to distinguish this case from the *Monticello Bank Case,* for we cannot understand the meaning of the language used, or why it was used, if it was not intended to make each bond a continuation of the one preceding, and altogether constitute one contract affording indemnity in the sum named." 174 S. W. 489.

It is significant to note that in this case there

were no renewal certificates issued, but a new bond was executed from year to year. And yet, it was held that the contract was continuing.

"While it is true, in the present case, at the end of each year, a new bond was issued instead of a renewal receipt, but each bond was in identical terms, and the last two bore the same serial number, and by them the guaranty company obligated itself to reimburse for any loss occurring 'during the term above mentioned (the annual period) *or any subsequent renewal of such term.*' The obligation is repeated in the bond as follows: 'During the continuance of said term, or of any renewal thereof, and discovery during the said continuance, or within three months thereafter.'" 174 S. W. 489.

This case likewise holds that the question of the conduct of the officers of the Lodge—whether or not the statements they had made were correct statements—whether or not they had used due care in making an examination, etc.,—were all questions for the jury.

"Whether the lodge made truthful statements in the certificates for renewal, and whether ordinary care was used to know whether the statements were true, were questions for the jury." 174 S. W. 489.

First National Bank v. U. S. Fidelity & Guaranty Co., 110 Tenn. 10, 100 Am. St. Rep. 765. Again same company and same bond. The question at issue was whether or not the amount was cumulative under the renewal, or whether it was limited to the

one penalty of $7,000. The Court, among other things, said:

"Now it is true that the renewal certificate is a new contract, but it is only a new contract as respects time; that is to say, *it extends the indemnity provided by the old contract to a new period of time. * * * The parties themselves understood there was only one bond and one penalty.* (Here reference is made to a letter written by the cashier of the bank). This letter, the record shows, was dictated by the counsel for the bank and shows how the contract was understood and interpreted by the bank, before this litigation arose. The officers of defendant company and the officers of other similar companies so understood it." 100 Am. St. Rep. 774.

We pleaded an express agreement, and alleged that both the Surety and the bank so understood it.

In *Alex Campbell Milk Co. v. U. S. Fid. & Cas. Co.,* 416 N. Y. Sup. 92, the Court held under a bond of this company, it was liable to cumulative amount; that is to say, there was a bond and three renewal certificates, and the court held that the company was liable for $7,500 if that much had been lost during the three year period, although the bond penalty was but $2.500.

But in our case, although the bank lost more than $50,000, we claim the right to collect but the one bond penalty of $25,000.

"In determining whether a guarantee is continuing or not, it should of course be read in the

light of the contract it is intended to secure, *and with regard to the situation of the parties at the time it was entered into, which may be shown by parol.*"

Spencer on Suretyship, Sec. 97.

See Frost on the Law of Guaranty Ins. 2nd Ed. pp. 99 to 104.

We quote from *North St. Louis Building & Loan Ass'n. v. Obert, et al.,* 169 Mo. 507, 69 S. W. 1046:

"But if it appears from all the circumstances that the intention of the parties to the contract was that the bond, being unrestricted by its own terms, should cover the acts of the principal during his continuance in the office, whether by re-elections or holding over, we cannot give it the restricted construction."

The case of *United States Fidelity & Guaranty Co. v. First National Bank of Dundee,* 233 Ill. 475, 84 N. E. Rep. 670, suit against the same Surety. The contentions made in the case were that certain renewal certificates had been procured through fraud, same as here.

"Appellant contends that the two certificates made by the bank to obtain a renewal contain false representations which render the certificates void, and that therefore the bond was not in force except for the first year. The charge of false representations raises an issue of fact. The burden of proof upon that issue is upon appellant, (the Surety company)." 84 N. E. 672.

"Appellant's contention is that the statement that the books and accounts of Wright had been examined was not true; that if an examination had been made the embezzlements of the cashier would have been discovered, and that the fact that they were not discovered is proof that no examinations were made." Ibid 672.

"Appellant insists that the failure of the bank to discover this discrepancy is conclusive proof that no examination was, in fact, made. This conclusion is not warranted by the facts and circumstances in this record. If it be assumed that an examination of the bank's books means only such a thorough and exhaustive examination as would necessarily discover the slightest irregularity that might exist, however cunningly covered up, then, of course, appellant's contention would be sound; but this is manifestly not the meaning of the word 'examination' in the certificates in controversy. If bank officers are to be held to such a rigid method of examination and supervision over the accounts of their employes *there would be but little necessity if any for purchasing fidelity insurance.* When a trusted employe conceives a scheme of criminal misappropriation of his employer's money, he at the same time matures his plans for covering up his wrongdoings. He has many advantages over his employer, since he knows what the real facts are, and is therefore always on his guard to allay suspicion, while the employer is ignorant of the real facts and therefore unsuspecting." Ibid 673.

"It is no doubt probably true that an expert accountant, in making a thorough and detailed examination into the affairs of this bank, might have discovered the irregularity of June 6th, 1901; but the officers of this bank were not required by any clause in the contract to make any such examination as above supposed." Ibid 674.

So in the case at bar, there is no requirement in the contract of insurance which requires an examination of any kind.

It was likewise contended in the above case that each renewal certificate constituted a separate and independent contract of insurance, just as is being contended here. We quote from the decision, at page 674:

"If the renewal certificate of 1902 is binding upon appellant and had the effect of continuing the bond in force for that year, then appellant is liable for the full amount of the decree below, since it is admitted that Wright's embezzlements during the year 1902 were largely in excess of the face of the bond. If appellant's contention as to the construction of the certificates be sustained, the result would be that the making of such a certificate would be an acquittance and release of the insurance company of all liability that existed on account of the infidelity of the employe prior to the date of the certificate." Ibid 674.

Still another question was discussed because the assured claimed the right to treat the renewals as cumulative and to recover $20,000, whereas the bond was for $10,000, and the court discusses this question and holds that there was one contract of insurance and that the renewal merely continued that contract in force for the time covered by the renewal certificates, and that therefore the recovery should be for the full amount of the bond penalty, but not cumulative.

Counsel for Surety, in the court below, cited the following:

Florida Cent. etc. v. American Surety, 99 Fed. 674.

Proctor Coal Co. v. U. S. Fid. & Guar. Co., 124 Fed. 424.

U. S. Fid. & Guar. Co. v. Williams, 49 Southern 742.

We submit that *Florida* decision by District Judge Shipman, has no application. The Surety was different. The bond was different. The conditions were different. It was what is known as a "schedule bond." An entirely different form of contract. At the opening of the opinion it says: "a bond of indemnity against loss through the defalcation of its employes *who were to be named.*" Later, what was called a "schedule register" was furnished, and this register was changed from year to year as the employes changed. It was a sort of blanket policy covering all employes, but names were to be furnished. *There was in the case no question of renewal certificates continuing the original bond in force.* On the contrary, the court says, at page 675:

"The surety company had *annually,* while it was insuring the plaintiff, issued to it a *new bond* of indemnity."

On the next page it says that the assured *each*

year made out a new schedule register of employes. Thus the risk was different each year. Page 677, the court says:

"It is also plain that the contract was blindly and clumsily drawn, but, so far as it relates to the circumstances of this case, we think it is capable of being understood. *The bond states no time of its duration, and gives the name of no person for whose conduct there is to be an indemnity.* To make the contract intelligible it must be read in connection with the schedule register and the notices of acceptance, and from them it appears that *annually a new list of employes was entered on the schedule.*"

Then the court goes on to say that some of the names of the preceding list had disappeared, new names taking their places, and that the annual premium had been paid for those only whose names appeared upon the schedule.

Again the court says:

"*The course of business between the parties,* as well as the bond itself, shows that there is to be an annual designation of employes upon the schedule, and an annual selection and acceptance of the names by the surety company." Ibid p. 677.

Page 678, the court says:

"For the period specified in the contract of insurance reference must be had to the *two other papers which,* with the bond, form the contract, and which indicate very plainly that the liability is confined to losses in the current year. This

construction is furthermore shown in the rider attached to the bond in suit."

Then the court says that the "rider" proves that insurance was limited to one year. So that in reality there were four papers to be examined in that case in order to determine what the contract really was.

Here the insurance was a direct guarantee upon the one man, Mitchell, in the one position, and continuation certificates were issued from year to year, which recited that the bond was *continued in force*. The certificate expressly "continues in force" the original bond. No such certificate issued in the *Florida case*, and the company was undertaking to insure a certain set of employes for one year, and a new and different set for the subsequent year. In other words, the risk was changing every year because of the change in the schedule of employes, and there were reasons why the insurance was expressly limited to the year.

Neither does the bond contain the provision for renewal as does the bond here. It was a straight guarantee for one year with no mention of renewal.

Proctor Coal Company v. U. S. Fid. & Guar. Co., is a case decided in 1903. There is a very material difference in the renewal certificates. In

the *Proctor case* the certificate is set forth on page 428, and provides:

"In consideration of the sum of $25, United States Fidelity & Guaranty Co. *hereby guarantees the fidelity* of C. H. Stanton in the sum of $5,000," etc.

The renewal certificate in this case (Tr. p. 28) reads as follows:

"In consideration of the sum of $100 the United States Fidelity & Guaranty Company *hereby continues in force* Bond No. T-450 in the sum of $25,000."

In the former there is no word about continuation; not even the word "renewal" is used, nor does it refer to any former bond. It appears to be a distinct and independent guarantee. While here the so-called renewal certificate is a certificate of continuation, continuing in force the bond as originally written.

The case was decided upon the question of whether or not an amendment should be permitted, and while the court does discuss the question of the continuation, that was not the real question before the court for decision. Near the close is this language:

"In my opinion the whole purpose and intention of this clause is that there shall not be double responsibility on the part of the company. It is not at all inconsistent with the right to discover

within six months after the expiration of the original bond or any renewal the dishonest acts of the employe, and to claim indemnity for the same."

The decision is by District Judge, upon an entirely different state of facts and renewal agreement.

Furthermore, the bond in the *Proctor case* did not contain the provision for renewals and continuation which are in the later bonds.

The *Williams case* in 49 Southern 742 appears more nearly in point, but it is based upon *De Jernette v. Fid. & Casualty Co.,* 33 S. W. 828, which it follows. That case was decided on an entirely different state of facts and different bond, and the same court (as we have shown supra) which rendered that decision has in two late cases refused to follow it, and pointed out the difference in the later bonds.

U. S. Fid. & Guar. Co. v. Bank of Monticello, 143 S. W. 997, is a late case upon the bond of this same company and the same form of bond at issue here. The Court says:

"Appellant refers to the case of *De Jernette v. Fidelity & Casualty Co.,* 98 Ky. 558, 33 S. W. 828, 17 Ky. Law Rep. 1088. This court did hold that the bond and renewals in that case were separate contracts; but upon a close examination of the facts of that case and those in the case at bar, a difference will be found."

Then, after examining and pointing out the difference in the two contracts, the Court says:

"Therefore, in order to obtain business, the indemnity and guaranty companies gave them a contract which would protect them."

The *De Jernette case* is cited in all three authorities relied on by counsel, and in all three, the early forms of bond were construed, and the later form of bond was unquestionably demanded by employers because of the earlier cases, and to meet those decisions. The later form, which is in question in this case, was put forth by the company, and the later decisions which we cite, all hold that it is one continuous contract of insurance.

In discussing these differences, the Kentucky Court of Appeals says further:

"But we are of the opinion that the facts of this case show that the parties intended that the bond and four continuation certificates should constitute one continuous contract. In the original bond this language is used: 'The company shall, during the term above mentioned or any subsequent renewal of such term,' "

That language is the exact language found in the bond here, but was not in the bonds in the earlier cases.

The case of *American Credit Indemnity Co. v. Champion,* 103 Fed. 609, is a decision of the Circuit Court of Appeals of the 6th Circuit. The

opinion is by Mr. Justice Lurton. The case is not parallel but by analogy in point.

The question was whether or not a certain renewal bond continued the original bond in force, and it was held that it did so. We quote from the opinion, the following:

"Both claims were, therefore, barred, unless they are saved by the eighth condition of the bond. That condition is in these words:

'In case this bond is renewed, and the premium on such renewal is paid at or before the expiration of this bond, loss on sales covered according to the terms, conditions and limitations hereof, resulting after said date of expiration upon shipments made during the term of this bond, may be proven under and subject also to the terms and conditions of such renewal. In case this bond is a renewal, and the premium has been paid at or before the expiration of the preceding bond, covered losses occurring during the term of this bond on shipments made during the term of the said preceding bond may be proven hereunder, subject also to the terms, conditions, and limitations of said preceding bond.'

"Both the first and second bonds contain this precise condition, and the terms, conditions and limitations of each are identical, save in respect to the initial loss and single debtor limitation. *The clear purpose and intent of this provision was to carry forward and indemnify the insured against losses which might result* from sales and shipments during the period of the first bond, but which would not be provable, under the prescribed terms of the bond, within the period of its life. This extension of the time during which losses might be probable is made dependent upon the issuance of a

renewal policy. The purpose of the renewed policy was twofold: First, it was a guaranty against loss upon sales and shipments made during its period; and second, *it secured or extended the guaranty* of the preceding bond to losses upon sales during its period which did not technically became provable during its term." 103 Fed. 611.

This is in line with our contention that the renewals which expressly recite that they continue in force the bond extended the guarantee of the preceding bond to losses during its period and throughout the period of the succeeding continuations.

"*This is the most reasonable interpretation, and accords most nearly with the justice of the matter.* In the case of *American Credit Indemnity Co. v. Athens Woolen Mills,* a cause decided by this court, and reported in 34 C. C. A. 161, and 92 Fed. 581, we found a difficulty of the same general character arising out of a doubt as to whether the definition of insolvency found in a renewal policy applied to a loss which was provable under the renewal bond, though it arose from sales made during the currency of the preceding bond. The condition by which the renewal bond was made to apply to losses originating under the preceding bond was not in all respects identical with that involved here, though substantially the same. Referring to the promissory clause of the preceding bond, we said:

'We are to consider that by that clause it was clearly intended to extend the benefit of the old bond to cover sales of goods made under that bond, though losses thereon did not accrue during its life; *and we ought not to defeat that intention and just expectation of the assured, unless the words*

of the renewal bond necessarily require it. Do they require it? We think not. In the light of the circumstances and the necessity for reconciling the clauses of the two bonds, the words of the clause 8 of bond No. 2443 may be reasonably construed to mean merely that the formal proof of loss is to be made under the renewal bond and during its life; while clauses No. 8 and 11 of bond No. 1540 shall be given effect by holding that the fact of the loss is to be settled by the terms of the old bond.'

"In the same case we held bonds of this character to be essentially insurance contracts, and that doubtful and ambiguous expressions were to be construed most favorably to the insured." 103 Fed. 613, 614.

American Credit Indemnity Co. v. Athens Woolen Mills, 92 Fed. 851. Decision by Judge Taft. It was held that the "renewal bond" carried forward the liability in the original bond, and that in determining the right of recovery the two must be construed together.

Fidelity Casualty Co. v. Fechheimer, 220 Fed. at page 401, is a recent decision by the Circuit Court of Appeals of Sixth Circuit. It is a case of much the same character as the two preceding. The second bond contained different terms and conditions from the first. One of the very points being made by counsel in the case at bar. At page 411 the Court says:

"The kind of losses on shipments made during the period of the second bond recoverable there-

under, differed materially from the kind of losses recoverable under the conditions of the first bond."

At page 413 is quoted from the decision of Judge Taft, the following:

"These contracts of indemnity are merely contracts of insurance, carefully framed, to limit as narrowly as possible the liability of the insurer, and doubtful expressions in them are to be construed favorable to the insured. * * * We ought not to defeat the intention and just expectation of the assured, unless the words of the renewal bond necessarily require it."

It was held that notwithstanding the provisions and conditions of the second bond were different, it was nevertheless a continuation of the first.

In *North Street Bldg. & Loan v. Obert,* 169 Mo. 507, 69 S. W. 1044, the court in discussing the question of continuation of a liability by renewal, said:

"When it becomes a matter of construction, it is the duty of the court to put itself in an attitude to view the contract from the same standpoint that it was seen by the parties when they entered into it."

We now wish to emphasize another clause of the bond under consideration which seems decisive.

"The Company's total liability on account of said Employe under this Bond or any renewal thereof, not to exceed the sum of TWENTY-FIVE THOUSAND ($25.000) DOLLARS." (Tr. p. 22).

Why was this clause inserted if the bond was not meant to be a continuing obligation? If these contracts are as now contended, separate, distinct and independent contracts, then the liability could not exceed Twenty-five Thousand Dollars. That a bond may not be held for any sum beyond its penalty is axiomatic. The fact that it says, "under this bond *or any renewal* thereof" the liability shall not exceed $25,000, establishes the fact that the company wrote this as a continuing bond, and with the intention that it should continue in force from year to year but limited to $25,000 loss. Otherwise, that language is not only superfluous but utterly meaningless, because in no event could any one bond limited to one year be held for a sum to exceed $25,000. The clear meaning is that the bond is to continue but the penalty not cumulate.

This is the fourth time and the fourth place in which the bond uses the term "renewal." What is the meaning and force of the word "renewal" so often used in this bond? Under the interpretation sought by counsel, it would mean nothing. If the contracts were to be independent annual contracts, they would be made as they came along and without inter-dependence. There would be no occasion whatever to stipulate for renewals as has been done in this bond, *nor to limit recovery to*

one bond penalty.

In pursuance of these stipulations and the agreement made with the Surety, it did without any further contract, without further application, without further written statements or representations, continue this bond—continue the suretyship, and the fact that one instrument in the chain is somewhat different in terms is wholly immaterial. It continued the insurance consecutively as to date. It was made under the same circumstances and conditions, for the same amount, for the same bank, on the same risk, and for premiums paid.

In *Home Lodge case,* 174 S. W. 487, the provisions of the bond are set forth at page 488. In passing, we wish to state that in that case it was pleaded, just as it is pleaded here, that the last extension had been obtained through misrepresentation and fraud; that the certificate given by the Lodge upon which the renewal was claimed was false and known to be so. It seems this company has a habit of setting up fraud when charged with liability.

The language of the bond in the *De Jernette* case, 98 Ky. 558, is as follows:

"Provided,—that on the discovery of any such fraud or dishonesty as aforesaid, the employer shall immediately give notice thereof to the company and that full particulars of any claim made

under this bond shall be given in writing, addressed to the company's secretary at its office in the city of New York, within three months after the expiration of this bond."

The words "or renewal thereof" are omitted. Neither does it contain the words "or any subsequent renewal of such term." Neither does it contain the language "committed during the continuance of said term or any renewal thereof." The renewals in the *De Jernette* case read as follows:

"The contract under bond No. ..... is hereby renewed in accordance with the tenor of the bond, the guaranty to cover the period above named *only.*"

An express statement that it is limited to the period named "only."

The court held that it was not an enlargement of the previous contract, and that the making of the new contract did not in any wise affect the rights of the parties under the previous contract either to enlarge or diminish them.

As was stated by the Court in the case of *U. S. Fid. & Guaranty Co. v. Bank of Monticello,* 147 Ky., and for reasons given in that opinion, the result of the decision in the *De Jernette case* was to leave the giving of surety bonds in a condition unsatisfactory to persons desiring such indemnity. The consequence was that in response to what must have been a public demand, the surety

companies issued policies binding them throughout continuations of a bond for acts committed during continuance of the suretyship. This new form of bond contains agreements that renewals or extensions of the same should renew and extend the original obligation throughout the period of such extension, which constitutes said bonds one continuing contract.

"It is reasonable to presume that, because of the construction placed upon the contract in the *De Jernette* case, that portion of the public wanting indemnity insurance, required a different contract, as it seldom occurs that embezzlement or larceny is detected within three, six, or twelve months after committed, especially if the employe has been in the service of his employer for some time and is trusted by him and is shrewd. Therefore, in order to obtain business, the indemnity and guaranty companies gave them a contract which would protect them."

U. S. F. & G. Co. v. Bank, 147 Ky. 285, 143 S. W. 997.

Clearly the contract for the last period was meant to be a mere continuation of the bond originally given. Besides this, the language of the original shows that a continuation is contemplated, and that an increase of the period for which the company shall be liable to the insured is intended, in case there should be such continuance of the suretyship.

The defendant company, in the light of the

De Jernette decision, has employed language which the courts held, obligated it to the assured as upon one continuing contract. It sold the Miners & Merchants Bank a bond containing such language, and then for consideration continued the same for eight consecutive years.

Had this company felt at the time it gave this bond that it was likely to be held to an obligation which it had not intended to assume, or which it was unwilling to continue to assume, it should, in good faith to the insuring public *and acting in good faith with the bank,* have so altered the form of its bond before it executed the original containing the renewal provisions, as to make it clear by apt language that it did not intend to so obligate itself. The English language afforded ample means to the surety company to make it clear that it did not mean to be bound continuously by continuing a contract from year to year, if it did not mean to be so bound.

Is it reasonable to suppose that if the bank had had the slightest intimation that the Surety would contend for any such construction, it would have accepted this bond in the first instance, or would have continued from year to year to pay the premiums for its continuation?

TESTIMONY IMPROPERLY REJECTED.

When the bank offered to prove all the allegations of its pleadings, the following objection was made:

"MR. DOVELL: To that we will object upon the ground that all negotiations between the parties were merged in the various written contracts set forth in the complaint, and any testimony of the character suggested by counsel would be an attempt to vary, enlarge or change contracts complete and unambiguous in their terms." (Tr. p. 121).

It is worthy of note, that counsel spoke of the contracts, using the plural, thus conceding that *all the contracts* must be construed together. Yet, the Honorable Trial Court treated the last one as standing alone and as being entirely isolated from all the others.

In the original motion to exclude testimony, counsel stated: "having in mind the pleadings and the opening statement of counsel, I move to exclude the testimony touching," etc. (Tr. p. 86).

Nothing was said about parol testimony.

The Honorable Trial Court, having proceeded upon the theory that the continuation was a separate and independent contract, held, that we could not show the relations which had existed between the parties prior to the date of that instrument.

He held that we could not go back and show that we had the former bond and intervening continuations. He seemed of the opinion that we were seeking by parol to vary the terms of the last contract.

We submit:

First: There is no justification for the assumption that we were going to rely upon *parol* testimony.

Second: That if necessary, parol testimony was admissible under the pleadings.

1st. (a) There is no allegation in the bank's pleadings in relation to parol testimony, and nothing from which it may be gleaned that the testimony was to be by parol, or what class of testimony would be offered.

(b) There is no word in the opening statement of counsel for the bank to the effect that the testimony would be by parol. The statements of counsel being that the bank would *prove the facts.*

(c) The offer of proof made, contains no statement or reference to parol testimony. It says, "offer at this time to prove," etc. (Tr. p. 120).

(d) When this offer was made, one counsel for Surety interrupted as follows:

"MR. McCLURE: That proof will be by parol? Your proof will be oral and not written?

"MR. ROBERTS: I have both written and oral evidence to prove that fact." (Tr. p. 121).

(e) Reference is made in the bond to the application signed at the time the contract was initiated. We want the right to introduce this written application, and the written application may prove all that we claim.

(f) Surety in its answer pleads that, at the time of the issuance of the bond, and at the time of the various continuations thereof, and as a condition of the bond and continuations, the bank made certain agreements with the Surety in relation to examination of the books and accounts of Mitchell to the end that any loss might be avoided, etc. (Tr. p. 50). It has not pleaded whether these alleged agreements were in writing, or parol. If they exist they are presumably in writing, and form a part of the contract, and the bank would be entitled to introduce them in evidence. The bond however shows that they were actually in writing.

(g) The bond provides: "It is understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, *unless otherwise stipulated between the Employer*

and the Company." This does not state the manner nor form of the stipulation, whether oral or written. It does not say that unless otherwise stipulated "in writing."

The bank alleges fully in its pleading that it was otherwise stipulated and agreed, and that is one of the things it offered to prove and wants to prove in the case.

Since no evidence was received by the court, and there is nothing in the record to the contrary, this Honorable Court may not now presume that the alleged stipulation was not in writing, because every doubt in the construction of the language of the bond, is to be resolved against the Surety.

This exception establishes that the bond was subject to modification by stipulation. That a continuation was anticipated. That the company was willing to so modify it as to allow a stipulation for continuous insurance. The bank alleged in the pleadings and asserted at all times that it had been otherwise agreed, and why we were deprived of our right to prove that it had been "otherwise stipulated," we cannot understand.

(h) Counsel for Surety, in opening stated:

"The notice was received, of course, by Mr. Mack Mitchell himself, who was the only one in the bank at Ketchikan. He thereupon notified us

that they did not desire a *renewal of the bond.*" (Tr. pp. 78, 79).

Bank in its reply alleged that, although the Surety had at all times dealt with officers of the bank at Seattle, Washington, and at all times collected its premiums there, and with knowledge that they were such officers and were in Seattle, did take up the matter of continuing said bond with Mitchell; that this written communication in relation to the continuation went to Mitchell without the knowledge of the officers of the bank, and that Mitchell concealed it from the bank, and that the bank never had any knowledge of the offer of the Surety to continue the bond, and never knew that Mitchell had notified the Surety that he, Mitchell, did not want it continued. That when the matter was called to the attention of the bank, it immediately called it to the attention of the Surety, and the Surety admitted its mistake and immediately executed the continuation. (Tr. pp. 54, 56).

The Honorable Trial Court seemed to labor under the impression that this letter had gone to the bank.

"MR. ROBERTS: And we have here the letter, as I said, of the company, writing up there, and offering this bond as a renewal.

"THE COURT: And your bank didn't take it.

"MR. ROBERTS: The bank never knew it, if the Court please. The bank never knew it. Bear in mind that Mr. Mitchell didn't have this bond written on himself, and never did. He had nothing to do with it. * * * Now then, the risk gets the letter, conceals it from his bank, conceals it from the party that demanded the protection and should have had the protection, and sends it back, and says that he does not want it renewed, and the bank knows nothing about it. * * *

"THE COURT: It was sent to the bank, I take that from the statements of both of you.

"MR. ROBERTS: No, it was sent to Mitchell.

"MR. DOVELL: It was sent to Mitchell, yes." (Tr. pp. 108, 109).

So that, according to the record, which is the exact fact, the letter was addressed to Mitchell at Ketchikan, and went to Mitchell, not the bank. And the statement of counsel for the bank to the court was, "we have here the letter, as I said, of the company, writing up there, and *offering this bond as a renewal.*" That statement was before the court, and upon the motion must be taken as true.

Miller v. Md. Cas., 193 Fed. 347.

We contend that this letter proves that the bank tendered and offered this bond as a continuation of the insurance. It is at least evidence of that fact. The writing of the letter stands admitted in the record. The date of it, to-wit, at the very time the bond was to be continued, is admitted. And

it establishes that the company then considered itself obligated under its contract to continue this *insurance, and that is not parol evidence.*

(i) The Surety admits the bank paid a premium for the last contract but says when the storm burst and the bank needed protection it tendered it back. For what was that premium paid? They say the date was November 25th, 1913. The instrument on its face says it is insurance from April 1, 1913. The presumption must be that the premium paid for insurance from April 1st to some future date. Why from April 1st, if it was not by agreement and as a mutual understanding that it was to cover the period then elapsed and avoid any question about the six months. The contract says: "during the period commencing upon the date hereof." (Tr. p. 29). As it dates from April 1st, the burden is upon defendant to prove that it did not become effective on that date. If it did become effective April 1st, then there was no six months lapse, and as a matter of law, no forfeiture.

(j) Counsel for Surety stated that Mitchell was a trusted employe, (Tr. p. 76) and that so great was the confidence of the bank in him that it made but one examination. The Surety likewise had great confidence in Mitchell and with equal opportunity with the bank to detect any

"flaw," it continued to write him as a risk, and when the bank went to the company for this renewal, it said: "Oh, well, we did neglect to renew your bond on time but it will make no difference that the six months has passed. We will fully protect you. Mitchell is just as safe now as he has been for the last seven years, and so we will just date it back and preserve the continuity of the insurance. We are willing to take that chance for the premium." *The bank paid the Surety to take just that chance.*

(k) The Surety admits that it would have continued Mitchell's insurance on April 1st, and admits and states that it did actually try to continue it at that time. What possible difference can it make whether it extended it April 1st, or November 25th, since it was continued for a period "commencing upon the date hereof," viz: on April 1st, thus continuing the insurance in an uninterrupted sequence.

(l) To establish that the bank had a contract for continuation of a bond which expressly provided for continuation, is not to vary the terms of the contract. The last contract is dated April 1st, 1913, and is to continue until terminated by notice. It is not as the Court and counsel both treated it, a bond for one year, nor an annual contract.

Therefore, we do not seek to vary or to modify its terms so far as its date is concerned, or its termination, or as to the signature, or amount, or the man insured against, or as to a single provision contained in it.

(m) Finally, we urgently insist that this instrument carries upon its face the mute evidence that it is a mere continuance of the contract of insurance. If not so, then it is so ambiguous that parol evidence is entirely competent.

The Honorable Trial Court fell into the grievous error of treating this as a bond from April 1st, 1913, to April 1st, 1914, whereas, it is in itself a continuing contract of insurance. IT HAS NO DATE OF TERMINATION. We quote: "and during the period commencing upon the date hereof and continuing in the sum of TWENTY FIVE THOUSAND ($25,000) DOLLARS until the termination of this insurance." (Tr. pp. 29, 30).

"3. This insurance shall only terminate by:
(1) The Employer giving notice in writing to the Insurer specifying the date of termination.
(2) The Insurer giving thirty (30) days' notice in writing to the Employer. (The Insurer to refund unearned premium in the above cases).
(3) The nonpayment of premium for a period of three (3) months beyond date due; all premiums being due in advance.
(4) The discovery of any loss through the Employee." (Tr. p. 30).

Therefore, instead of requiring a renewal certificate from year to year, it automatically continues in force until such time as either the insured or the insurer shall by *written notice,* cancel it.

The word "annual" is not in this instrument. It says *all premiums* are due in advance, showing that the company expected to collect additional and "continuing premiums."

The original bond insured from April 1st, 1906, to April 1st, 1907. (Tr. p. 21). Nothing of the sort is contained in the last continuation. (Tr. p. 29). Showing that this instrument is a mere continuation certificate. Showing that it was issued not as an original contract of insurance but a continuation of a former insurance, and so worded that it would not thereafter have to be re-executed from year to year, "continuing in the sum of TWENTY-FIVE THOUSAND ($25,000) DOLLARS until the termination of this insurance."

How in the light of this language in this instrument, may this company be allowed to say that it never did write and never intended to write a continuing insurance? Counsel in argument to the Trial Court stated:

"Your Honor can readily see that no liability company could write a policy unless it had some such provision. It would never know that its liability had terminated." (Tr. p. 95).

While the very instrument then before the court was a perpetual insurance, unless terminated by notice, or loss.

The *bond* of April, 1906, is called "FIDELITY BOND." (Tr. p. 20). It contains twenty-one paragraphs and the word "BOND" is used in it thirty-five times. It is even in the attesting clause. It is the only instrument throughout the contract, which is called a "bond." The last one, Exhibit "C", (Tr. p. 29), nowhere contains the word "bond." It is not designated as a bond, and the word "bond" occurs nowhere upon nor within it. It contains but one paragraph with three short provisos. It provides:

> "This insurance shall only terminate by:
> (3) The nonpayment of premium for a period of three months beyond date due; all premiums being due in advance." (Tr. p. 30).

On what date is this premium due? You cannot find out from the instrument. Is it a quarterly premium, a semi-annual premium, or annual? At the beginning it says: "The insurer for a premium of $62.50," but it does not say an "annual" premium. The word "annual" cannot be found in the instrument. The word "year" is not in it. It may be that the company has increased its premium to $125 per year, and that the $62.50 is but a semi-annual premium. The instrument is silent,

and the matter must be determined by some evidence *dehors* the record if this instrument is to stand alone. The bond in the case uses the term "annual premium," (Tr. p. 20), and in the body of it, it says the premium is for a period of one year. Therefore, to determine that this $62.50 is an annual premium, and that it is payable from year to year, you must turn back to the *bond.* The two must be read together, and when the two are construed together, it means that there must be paid an annual premium of $62.50, and that it must be paid from year to year in advance.

Again, "during the period commencing upon the date hereof and continuing in the sum of TWENTY-FIVE THOUSAND ($25,000) DOLLARS until the termination of this insurance." Until the termination of this "insurance," not until the termination of this "bond." Not until the termination of *this* contract, but until the termination of *the insurance.* What insurance? The insurance originally written and continued. And you must turn back to the bond to determine what insurance is being continued. In other words, this last instrument simply continued the insurance modifying it to some extent as to conditions.

To avoid writing a continuation each year the company continued this one by giving a certificate

which, like the brook, goes on forever. It was probably done to avoid further oversight about continuation on time, and to assure the bank there would be no future trouble about continuation.

Silliman v. International Life Insurance Company, 174 S. W. 1131, is a case from the Supreme Court of Tennessee, decided March, 1915. There was involved the question of whether or not a life policy continued the terms of a former policy. The defense was made by the company, among other things, that the premium rate was different in the two bonds, and that the latter contained different terms, and therefore, the two were independent isolated contracts. We are making the point here that this surety took but the one application, and that in May, 1906. The fact that the second bond was written in the above case without application is a point which is given much consideration by the Tennessee Court, in holding that the second bond was a continuation. We quote:

"It seems to us quite clear that under the facts stated the new policy was but a continuation of the same insurance contract. *It was based on the old application* and the old medical examination." p. 1132.

"The differences between the policy sued on in *Gans Case* and that before us are now apparent. Not only is there nothing to show that the policy of 1914 is 'an independent, complete and isolated contract,' expressing no dependence on or connec-

tion with the term policy, but, on the contrary, it is expressly shown that they are connected and that the second was issued because of and in compliance with the agreement therefor in the first policy."

"Furthermore, the suicide clause in the policy sued on does not refer to the date of this policy, but 'within one year from the date on which this insurance begins.' It is true that if the policy stood alone, 'this insurance' would have to be construed as referring to the date of the policy; but it appearing from what we have already said that the dominant purpose was to carry out the contract embraced in the policy of 1910, this clause must be held to apply to the date of that policy, since it was then that 'the insurance' began. Any other construction would result in giving an effect to the clause in question which would nullify the whole tenor of the contract between the parties."

Silliman v. International Life Ins. Co., 174 S. W. 1131.

Counsel for Surety in opening statement said:

"Then in November sometime they come to us and say, 'How is it that *that bond* was not issued in April? We *wanted that* bond. We want *that bond* and will you kindly write it and date it back to April 1st?' " (Tr. p. 80).

The Surety admits that it did kindly write it and date it back to April 1st. It accepted the proposition and took the money. But counsel says:

"We were tricked into writing the last bond." (Tr. p. 81).

These admissions of counsel prove our entire contention. The bank did not go to the Surety and say it wanted to take out some new insurance

upon one Mack Mitchell, but inquired why the Surety had not kept its agreement and extended the insurance it had and said it still wanted it at that time. That is, it wanted the extension. Then comes the entirely conclusive statement: "We want that bond." Not some new independent contract; not something different, but "that bond." That is to say, the original bond according to the agreement, but not some new isolated contract. "And will you kindly write *it* (that is, the bond originally agreed upon; not a new one) and date it back to April 1st?" (That is to say, the date you should have written it). To all of which the Surety now admits it assented, but says it was tricked into the assent. On that point we will meet them at Armageddon—before the jury.

There is here no question of the statute of limitation. We made the discovery and notified the Surety within about two years from the time of the first breach of the bond, the defalcations continuing, however, right up until the time of the discovery. The sole contention on this point is, that we failed to make the discovery within a period of six months from the time at which our insurance expired. Bank made the discovery in little more than two months after the six. Counsel contends that at the time bank made discovery, his company had no bond in force.

"I expect the evidence to show you that the plaintiff, the Miners & Merchants Bank, had no bond of our company." (Tr. p. 75).

Page 79, Counsel states that the Surety is not liable unless the bank discovered the loss within six months from April 1st, 1913, that is the date of the last instrument, and that contract clearly was in force at the time we made the discovery, unless as they pleaded, we had procured it through fraud, and that must be a question of fact for the jury. The Trial Court found that instrument to be in force and gave judgment for $688.27 on account of it.

In *Eilers Music House v. Hopkins,* 73 Wash. 281, the bond contained the provision that an action must be instituted within six months after the completion of the work. The court said:

"In this case, while the action was not brought within six months after the work was completed, there was evidence to the effect that the suit was delayed at the request of counsel for the Surety Company. The Court heard this evidence and no doubt believed that state of facts. It follows, of course, that where there was a delay at the request of the surety company or its representatives, it cannot be heard to say that the action was not brought within time. In other words, the court properly found upon sufficient evidence that there was a waiver of both these provisions of the contract by the Surety Company." p. 284.

In *Ilse v. Aetna Indemnity Co.,* 69 Wash. 484, the same Court said:

"To determine whether the limitation upon the commencement of the action is reasonable, the bond, the contract, and the facts of the particular case must be considered together."

The bond recites: The employer "has filed with THE UNITED STATES FIDELITY AND GUARANTY COMPANY, hereinafter called 'The Company,' an application," etc., showing that the application was in writing. The employer has "delivered to the Company certain representations and promises," likewise in writing. Then there are all the subsequent contracts and transactions continuing through a period of eight years, and the entire transaction must be treated as a whole. We will be able to show complete waiver.

The bond guaranteed all loss "which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter." The continuance of what term? The term of the insurance. The insurance has been continuous and that is not disputed. That is to say, there was at all times an instrument of some character in force. Not a day elapsed but that this company had a bond on Mitchell in the same amount. The insurance never lapsed, and counsel has wholly and utterly failed to differentiate between the insurance and the instruments themselves.

Counsel reads this language to mean that the discovery must be made within six months after the expiration of each instrument. But it would seem that language could scarce have been made plainer to express the intention that it is six months

after *the expiration of the insurance,* not any one instrument.

The term had continued for eight years, and we are going back only two years.

"Suretyship is a fact collateral or extraneous to the contract itself rather than a part of it, whether the instrument be under seal or not."

Spencer on the Law of Suretyship, Sec. 2.

The unconditional acceptance of a past due premium on a life insurance policy is a waiver of the condition that nonpayment of premiums will cause the policy to lapse.

Clifton v. Mutual Life Ins. Co., 84 S. E. 817.

PAROL TESTIMONY ADMISSIBLE.

"The statute of frauds has no application to insurance generally."

Frost on the Law of Guaranty Insurance, p. 34.

"Since a contract of insurance can rest in parol, it follows as a necessary corollary that generally *a policy may be renewed by parol;* and this seems to be true, even though the policy requires the renewal to be acknowledged by a writing."

Cooley's Briefs on the Law of Ins., Vol. 1, p. 398.

Carey v. Nagle, 5 Fed. Cas. 60.

"That an insurance company can, by a preliminary parol contract bind itself to issue or *to renew a policy in the future* seems too well settled to admit doubt."

McCabe Bros. v. Aetna Ins. Co., 9 N. D. 19, 47 L. R. A. 644.

"Contract of insurance may be in writing, or may be verbal, or partly in writing and partly verbal."

Rankin v. Northern Assurance Co., 152 N. W. 325.

"In *Commercial Mutual Marine Ins. Co. v. Union Mut. Ins. Co.,* 19 How. 321, 15 L. ed. 636, it was held by the Supreme Court of the United States, that, under the common law, a promise for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond, a bill of exchange, or a negotiable note." 47 L. R. A. 644.

"The issuing of a policy furnishes a convenient mode of proving the contract, but it is not essential to its validity."

Walker v. Metropolitan Ins. Co., 56 Me. 371.

"In answer to this question we are confronted at the outset with the proposition that the statute of frauds has no application to insurance generally. Is guaranty insurance to be the exception to the rule? A careful consideration of this question leads inevitably to a negative answer. This conclusion is based partly upon an analysis of the contract of guaranty insurance itself, and partly upon an examination of the authorities bearing upon the proposition now before us. The analysis here referred to brings us certain salient features, all of which have a direct bearing upon the question of the applicability of the statute of frauds to guaranty insurance. *These are the unquestioned intention on the part of the guarantor* (the insurer) *to benefit itself by securing a premium; the creation of a new contract between the guarantor and the party guaranteed; the recognition of a future rather than of a present liability, and this invariably*

a contingent one; the presence of a new consideration, the premium, whether running from the party guaranteed or from the principal himself."

Frost, p. 34.

"Whenever the contract of guaranty is founded upon a new and valuable consideration with the immediate object of subserving some pecuniary or business purpose of the guarantor, then such a guaranty is not within the statute of frauds, even though it has the legal effect of discharging the debts of another."

Frost, p. 35.

"Whenever the main purpose and object of the promisor is not to answer for another but to subserve some business or pecuniary purpose of his own, involving either benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form the promise to pay the debt of another and although the performance of it may incidentally have the effect of extinguishing that liability." Ibid.

Slater v. Emerson, 60 U. S. 244.

National Bank of Ashville v. Fidelity & Casualty Co., 89 Fed. 819, Circuit Court of Appeals, Fourth Circuit:

"This issue was whether or not in November, 1893, the defendant company through its agents, had agreed to renew the bond." p. 821.

"Barnard testified that a few days after the interview with Stikeleather in November, he met Rawls on the street and said to him that he had decided to continue the insurance in the defendant company, and that the bank would pay for the renewals, and he would either send the money over or that Rawls could send and get it, and he testified that

Rawls said 'all right.' It was conceded in the trial of the case that if this conversation to which Barnard testified, but which Rawls denied, took place, it constituted a contract for renewal, which bound both the bank and the defendant company; and that, as it was before any suspicion of Pulliam's dishonesty arose, his bond was in force whether the premium had actually been paid or not, *as the alleged conversation amounted to an agreement to keep the bond in force, and give further credit for the renewal premium.*" p. 822.

"It does, however, appear that this issue was fairly put to the jury, and it appears to us that the court's instructions on that point were at least as favorable to the plaintiff as it was entitled to." p. 822.

"The judge in another part of his charge repeated this instruction and commented upon the contradiction in the testimony of the two parties as to whether such a contract was made, and directed the attention of the jury to the requirement that the parties to it must have agreed together, and the two minds coming to an agreement; and in the end he left the issue to be determined by the jury upon the testimony." p. 823.

It was held in Pennsylvania that even the law requiring all applications and statements made, upon which insurance was based, to be attached to the policy, does not, by implication, change the established rule in regard to oral contracts.

Lenox v. Greenwich Ins. Co., 165 Pa. 575, 30 Atl. 940.

Cooley in Vol. 1, at page 400, states that where there are special statutes or charters requiring insurance policies to be signed by the proper officers,

they do not preclude the companies from making oral contracts.

In *Brown v. Franklin Mutual Fire Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534, the Supreme Court of Massachusetts said, that it could see no reason why the general rule should not apply to mutual companies, unless there was something in the statute or in the by-laws of the company which prevented such companies from contracting by parol.

"It appears to be the general rule that an oral contract of insurance is not within the statute of frauds."

Cooley's Briefs on Law of Ins., Vol. 1, p. 402.

The author cites list of authorities.

"In *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, an oral contract of renewal from year to year subject to termination at any time, was held not to be within the statute of frauds. * * *

"An agent who is authorized to take risks can make oral contracts binding on his company."

Cooley, Vol. 1, p. 403, and list of cases cited.

"If the company agreed that the policy should be a permanent one, that is to say, renewed from year to year, without further application, until notice to the contrary, it will cover a loss occurring after the expiration of the original term, and before the renewal certificate is actually issued."

Trustees of Baptist Church v. Brooklyn, 18 Barb. 69.

Although the original contract may provide that it shall not be altered or modified unless the agree-

ment therefor be evidenced in writing, yet a subsequent agreement by parol to alter or modify, will be as valid as if no such stipulation had been made.

Home Ins. Co. v. Gaddis, 3 Ky. Law Rep. 159.

It was provided by an open policy that before insurance could be affected or modified by an agent of the insurer, the same should be made on the policy, or by the issuance of a certificate. Held, that the policy could be modified by parol.

Day v. Mechanics & Traders Ins. Co., 88 Mo. 325.

A policy may be modified or rescinded by subsequent verbal agreement which is supported by the mutual assent of the parties.

Mobile Life Ins. Co. v. Pruett, 74 Ala. 487.

If a binding slip is informal, its legal effect as an agreement may be made known by parol evidence of custom.

Underwood v. Greenwich Ins. Co., 161 N. Y. 413.

Parol evidence is admissable to show the acts and declarations of an insurance agent in writing the answers to questions in an application for life insurace, although it may contradict answers written by him.

Marston v. Kennebec Mut. Life Ins. Co., 89 Me. 266.

Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61.

Although a policy provides that nothing less than a written agreement endorsed on it will

suffice to establish a waiver, it may, nevertheless, be shown by parol that insurer has waived.

Mix v. Royal Ins. Co., 169 Pa. St. 639, 32 Atl. 460.

Parol evidence is admissable to show that insured informed insurer's agent that building stood on leased land, although the policy provided that no waiver should be effectual unless endorsed on it.

Insurance Co. v. Nat'l. Bank, 88 Tenn. 369, 12 S. W. 915.

Parol evidence is admissable to show that when insurer issued the policy it had knowledge of the existence of other insurance, and is therefore estopped from claiming that it is not liable because its policy prohibited other insurance.

Fireman's Fund v. Norwood, 69 Fed. 71.

Glover v. National Fire Ins. Co., 85 Fed. 125.

Insured may show by parol that his policy was issued by an agent with knowledge that he intended to procure other insurance, and that the property covered by it was encumbered, notwithstanding it is provided in the policy that it shall be void in either such case unless insurer's consent thereto is endorsed thereon in writing.

McElroy v. British American Ins. Co., 94 Fed. 990.

Although a policy provides that its conditions may be waived only by the written consent of insurer's secretary, a waiver may be shown by parol.

Alabama Mut. Ins. Co. v. Long, 26 S. Rep. 655.

Insured may testify in an action to recover damages for the breach of a parol agreement to renew a fire policy, that he relied upon such contract and would have procured other insurance had he not believed that the policy was renewed.

McCabe v. Aetna Ins. Co., 81 N. W. 426.

Insured's agent may testify concerning statements made by him to insurer's agent when the policy was procured.

Insurance Co. v. O'Connell, 34 Ill. App. 357.

Where an agent is a medium of communication between insurer and insured, evidence of a conversation between the agent and insured is admissable, regardless of the scope of the agent's general authority.

Medearis v. Anchor Mut. Fire Ins. Co., 104 Ia. 88.

"It is established in England, after some fluctuation that a promise to indemnify or save harmless one who is himself answerable or to become answerable for the debt or default of another is not within the statute of frauds and hence need not be in writing. This view of the law has been adopted by most of the courts of this country."

Spencer on the Law of Suretyship, Sec. 75.

"The objection that such evidence tends to vary or contradict a written contract, being met by the answer that suretyship is a fact collateral or extraneous to the contract itself rather than a part of it, whether the instrument be under seal or not." Ibid, Sec .2.

The bond in this case provides for the signature of the "risk" Mitchell, and this same company has on several occasions refused payment of its bonds because the "risk" had not signed, but every such case has been decided against it.

Prosser Power Co. v. U. S. Fid. & Guar. Co., 73 Wash. 304.

Proctor Coal Co. v. U. S. Fid. & Guar. Co., 124 Fed. 424.

U. S. Fid. & Guar. Co. v. Haggart, 163 Fed. 801.

Proctor case is the one upon which the Surety relies here. It is held that the delivery of the bond and the acceptance of the premium is a waiver of this condition, and the company is estopped.

The bond in question is not signed by Mitchell; the Surety is not raising that question, although it is otherwise relying upon the provisions of the bond which says none of its conditions may be waived, except in writing.

In *Parsons v. Pacific Surety Co.,* 69 Wash. 595, it is held that although a surety bond contained a provision that there should be no liability unless written notice of default was served upon the company at its home office, this provision might be waived and that notice on the local agent was sufficient notwithstanding the policy contained clause against waiver, and expressly by its terms, required the notice, and that it must be given at home office.

The following Washington decisions are to the same effect:

U. S. Fid. & Guar. Co. v. Cowles, 32 Wash. 120.

Pac. Bridge Co. v. U. S. Fid. & Guar. Co., 33 Wash. 47.

Trinity Parish v. Aetna Indemnity Co., 37 Wash. 515.

Gritman v. U. S. Fid. & Guar. Co., 41 Wash. 77.

Sheard v. U. S. Fid. & Guar. Co., 58 Wash. 29.

Parsons v. Pac. Surety Co., 69 Wash. 595.

Eiler's Music House v. Hopkins, 73 Wash. 281.

"That an insurance company can by a preliminary parol contract bind itself to issue or to renew a policy in the future seems too well settled to admit doubt."

McCabe Bros. v. Aetna Ins. Co., 9 N. D. 19 47 L. R. A. 644.

"The defendant concedes that the policy which was to be renewed under the terms of the parol agreement was the policy of the defendant, and that the same was issued by McBride as agent, with full authority to do so, and it seems unreasonable to suppose that the parties in making this parol agreement believed that they were dealing with McBride personally, instead of in his capacity as such agent. If the parol contract to renew had been fulfilled by McBride, it would have been done as agent." Ibid 642.

Here the renewal certificates from year to year show that the renewals were made by the same agency which had originally written the bond.

See *Commercial Union Assur. Co. v. State ex rel Smith,* 113 Indiana 331, 15 N. E. 518; *Post v. Aetna Insurance Co.,* 43 Barb. 361. Oral contract to renew insurance contract held valid.

"The possession and use of the defendant's certificates of renewal, together with the exercise of that authority in other instances, indicate that the power of renewing and continuing insurances had been conferred upon this agent."

43 Barber 351.

It was held that the oral agreement to renew the insurance was a valid agreement.

"In *Commercial Mutual Marine Ins. Co. v. Union Mut. Ins. Co.,* 19 How. 321, 15 L. ed. 636, it was held by the Supreme Court of the United States, that, under the common law, a promise for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond, a bill of exchange, or a negotiable note."

47 L. R. A. 644.

In *First Baptist Church v. Brooklyn F. Ins. Co.,* 19 N. Y. 305, the Supreme Court of New York sustained the validity of the unwritten agreement to continue a policy of insurance from year to year until notice to the contrary should be given, and that, notwithstanding the policy provided it might be continued, provided the premium therefor was paid, *and endorsed on the policy,* or receipt given for it, and that no insurance whatever, original or continued, should be considered binding until the actual payment of the premium.

"Certain errors are assigned on the admission of evidence. We have examined the rulings complained of, and we do not find any prejudicial error. That evidence of custom on the part of McBride, the agent, to extend credit for premiums, was admissible, see *Ruggles v. American Cent. Ins. Co.,* 114 N. Y. 415, 418, 21 N. E. 1000; *Church v. LaFayette F. Ins. Co.,* 66 N. Y. 222, 225; *Potter v. Phoenix Ins. Co.,* 63 Fed. Rep. 384; *Commercial F. Ins. Co. v. Morris,* 105 Ala. 498, 18 So. 34; *Newark Mach. Co. v. Kenton Ins. Co.,* 50 Ohio St. 549, 558, 22 L. R. A. 768, 35 N. E. 1060, 1064; *Cohen v. Continental F. Ins. Co.,* 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296. The testimony of James McCabe, to the effect that he relied upon the contract to renew, and that they would have procured other insurance had they not believed that the policy was renewed, was not, we think, prejudicial under the circumstances, and could not have misled the jury."

47 L. R. A. 645.

Wilson v. German American Ins. Co., 146 N. W. 945, Supreme Court of Nebraska. The parties to a contract of fire insurance may agree orally to renew such contract, and the evidence in the case was held sufficient to show that the agent did agree to renew.

"If the local agent of a fire insurance company has, by agreement, renewed a policy of insurance from year to year and such agreement has been acted upon by the company, the fact that the insured knew that the agent had no authority to waive the written conditions of the policy, will not estop him to assert that the agent was authorized to so renew the policy." Ibid.

In *Firemans Fund Ins. Co. v. Searcy, et al,* 80 S. E. Ct. of Appeals of Kentucky, it was held, in-

surance agent having authority to solicit insurance, settle the terms of insurance and to issue and renew policies, has authority to make a parol contract to issue or renew a policy. Evidence in that case held to sustain the finding that the defendant's agent did renew the policy.

Sun Ins. of London v. Mitchell, 65 Southern 143, Supreme Court of Alabama:

"An agent duly authorized to bind his company by contracts for insurance may make valid contract by parol, or by binding slip or memorandum. And a general authority to solicit insurance, receive premiums and deliver policies is sufficient to cover an executory contract to insure." Syllabus.

"Whether the minds of the insurer's agent and insured met upon the terms of an oral contract of insurance, held, under the evidence, for the jury." Syllabus.

The actual representations made by insurer's agent may be proved by parol, although they were incorrectly reduced to writing by the agent.

German Amer. Ins. Co. v. Hart, 43 Neb. 441, 61 N. W. 582.

Where the policy does not declare the intention of the parties, parol evidence is admissible for the purpose of showing what the contract was, and making its meaning clear.

Milwaukee Mechanics Ins. Co. v. Brown, 3 Kan. App. 225.

A verbal promise made by one of the parties at the time a written contract was executed, if it

was made to obtain the execution of it, may be proven.

Royal Ins. Co. v. Walrath, 17 Ohio Ct. Court 509.

The issue being whether a life policy was a speculative and wagering one, it is competent for insurer's agent to testify as to the negotiations which preceded the application.

Equitable Life Ins. Co. v. Hazelwood, 75 Tex. 338, 12 S. W. Rep. 621.

That a standard form is prescribed by statute does not invalidate a parol contract of insurance evidenced by a binder, intended to cover the property up to the issuance of the policy.

Lea v. Atlantic Fire Ins. Co., 84 S. E. 813.

Parol testimony is admissible to show that both parties understood when the contract was affected that the policy on barn, sheds and additions attached, covered sheep and hog-pens.

Cummings v. German American Ins. Co., 46 Atl. 902.

The consideration and purpose of an assignment of a life policy, although the assignment is absolute in form, may be shown by parol.

Kendall v. Equitable Life. Ins. Soc., 171 Mass. 568.

Parol evidence is competent to show that insurer's agent agreed that an endorsement should be made on the application giving plaintiff the right to place an encumbrance on the insured property.

Copeland v. Dwelling House Ins. Co., 77 Mich. 554, 43 N. W. 991.

Parol evidence is competent to show that agent knew of other insurance and was instructed to make the proper endorsement.

Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883.

The mistake of insurer's agent may be proved by parol, although a policy provides that the description of the property shall be a contract and a warranty.

Dowling v. Merchants Ins. Co., 168 Pa. St. 234.

Virginia etc. Ins. Co. v. Goode, 95 Virginia 762.

Parol testimony is admissible to show that insurer's agent knew the property was encumbered, although the policy stated otherwise.

Dick v. Equitable F. & M. Ins. Co., 92 Wis. 46.

Chenier v. Insurance Co. of N. Amer., 72 Wash. 27, an oral contract to issue fire insurance policy was under discussion. While in that case an action for damages was instituted for failure to renew a policy, the court held, first, *that an oral contract to renew an insurance policy is valid;* second, that an oral agreement for insurance is valid.

"On September 1st, 1908, respondents entered into an oral contract with appellant through its agent, by which it agreed that, upon the expiration of the policy on January 1st, 1909, a new policy should be executed, in other words, that the insurance should then be renewed."

The court in that case refers to *Hardwick v. State Ins. Company,* 24 Ore. 547, where a part of the oral agreement was that the new policy should commence July 20th, 1889, as though the policy had been actually delivered on that date. Oral evidence was received of a contract that the policy should become effective as from a certain date. The last continuation in the case at bar is dated April 1st. Counsel allege in their pleadings and asserted at the hearing that, as a matter of fact the extension was not executed upon that date, but in November following. Can there be any question but that the actual date of this instrument and the circumstances surrounding its execution are proper subjects of inquiry by parol evidence? There are many authorities holding that the true date of such contracts may be shown. The very fact that an issue is raised as to the date of its execution makes it subject to parol evidence.

The question of whether or not this instrument was executed in continuation of the former bond is a part of the subject matter, and is no more sacred than the question of the date of the execution, and the time it was to take effect. To say that it is a renewal or continuation is not to change its terms, the Surety having conceded in both its pleadings and its statements that for eight years it had been writing this risk, and accepting the premiums. We say that it was to take effect April 1st. That is the date of the document, but it is otherwise

silent as to when it takes effect, therefore we do not change the terms. We say that is the date to which the insurance had been continued. We say the transaction of April 1st, 1913 (or whenever it did occur), continued the contract of insurance until terminated. The Surety denies this because it says we fraudulently procured the continuation. That is all a question of fact for a jury, and the crux of the defense.

We pleaded:

(a) That originally, and as an inducement to procure this business, the Surety agreed to keep it in force. That it ratified this from year to year by extensions and accepting premiums.

(b) That at the time the last instrument was given, it was agreed that it should be and was in continuation of the insurance.

"An oral promise made by one party in consideration of the execution of a written instrument by the other may be shown by parol evidence."
17 Cyc. 477.

"It has been held that where the execution of a written instrument has been induced by an oral stipulation or agreement made at the time, on the faith of which the party executed the writing, and without which he would not have executed it, but such agreement or stipulation is omitted from the writing, even if its omission is not due to fraud or mistake, evidence of the oral agreement or stipulation may be given, although it may have the effect of varying the contract or obligation evidenced by the writing, where there has been an attempt to make a fraudulent use of the instrument in viola-

tion of such promise or agreement, or where the circumstances would make the use of the writing for any purpose inconsistent with such agreement dishonest or fraudulent. This rule is put upon the ground that the attempt by one party afterward to take advantage of the omission of such terms from the contract is a fraud upon the other party who was induced to execute it upon the faith of such promise, *and hence he will be permitted to show by parol evidence the truth of the matter.*"

17 Cyc. 693.

"The rule excluding parol evidence to vary or contradict a writing does not extend so far as to preclude the admission of extrinsic evidence to show prior or contemporaneous collateral parol agreements between the parties. Nor is it necessary in order to render evidence of an independent collateral parol agreement admissible that the written agreement should contain any reference thereto. Existence of the alleged collateral agreement is a question for the jury."

17 Cyc. 713, 714.

"It was error for the court to refuse to permit the purchaser to testify what it was that took him to defendant to buy goods, since such examination was admissible to show the circumstances that caused the purchaser to go to defendant to buy goods, in order to show the improbability of the sale's having been made through plaintiff's solicitation."

Wheeler v. Buck, 23 Wash. 679.

"While the terms of a written contract may not be varied by parol, it is competent to show that, at the time of the making of a written contract of sale of land to a railroad company for a specified consideration, there was a collateral oral agreement to the effect that certain fences and guards were to be built and maintained by the company as part of the consideration for the sale, since oral testi-

mony is competent to show a consideration in addition to that expressed in the contract."

Windsor v. St. Paul etc. Ry. Co., 37 Wash. 156.

"But it is equally well established that matters which are independent of the contract may be proven by oral testimony. The trouble in each particular case is to determine whether the case falls within the general rule or within the exceptions of it."

37 Wash. 160.

"A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the execution of the writing, may be given in evidence."

Powelton Coal Co. v. McShain, 75 Pa. St. R. 238.

"When a promise is made by one in consideration of the execution of a writing by another, the promise may be shown by parol evidence."

Shughart v. Moore, 78 Pa. St. 469.

"A verbal promise at the making of a written contract, if made, to obtain its execution, may be given in evidence."

Graver v. Scott, 80 Pa. St. 88.

"The mere receipt of a bill of parcels or bill of lading, on payment of money or delivery of goods is not necessarily an assent to the proposition that such bill of parcels or bill of lading states the contract and the whole contract between the parties. *Such bills may or may not be the contract."*

Bank of British N. America v. Cooper, 137 U. S. 477.

So here, anything that appears to be the last

document may not be the whole contract. *It nowhere says that it is.*

The records show that it was given without any written application, and without any new statements, and we assert that it is not only improbable but impossible that it was treated as a new bond when it was executed without any new application or any application whatever, but simply in pursuance of original applications, statements, etc. But none having been given or taken, certainly the omission is subject to explanation by parol.

"There may be instances in which a contract is partly in writing and partly oral and the two together constitute the contract, so there may be a question of fact as to whether the written agreement is or is not the entire agreement."

Dennis v. Slyfield, 117 Fed. 474.

"Before this rule as to parol can be applied, the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was what was the contract between the parties."

Mobile & Mont. R. R. Co. v. Jurey, 111 U. S. 591.

"There is perhaps no rule of law which is more flexible or subject to a greater number of exceptions than the rule which in actions of law excludes parol evidence offered to vary or explain written documents. It has been said that in the multitude of exceptions much confusion has arisen, so that the exact limit to be placed upon the exceptions depends not only upon the peculiar facts of each case, but also to some extent upon the *peculiar cast of thought of the individuals composing the court. It may be stated generally,*

however, that the courts have endeavored to adapt their rulings, either way, to the obvious demands of abstract justice in each particular case."

17 Cyc. 638.

Lea v. Atlantic Fire Ins. Co., 84 S. E. 813.

"The general rule is that parol evidence is admissible to establish a fact collateral to a written instrument, which would control its effect and operation as a binding engagement."

Bartholomew v. Fell, 139 Pac. 1016.

To prove that the last continuing instrument was delivered to be effective April 1st, does not vary its terms because it became so by its terms. To prove that it was given in pursuance of the contract of insurance which had been in force for seven years does not in any sense change or vary the terms of the instrument. This would no more vary nor change its terms than to show that a promissory note was conditionally delivered and was to take effect only upon certain conditions.

That such evidence is proper and competent was expressly decided by the Supreme Court of the United States in *Burke v. Dulaney,* 153 U. S. 228.

"It has been held that parol evidence is admissible to apply the terms of the contract to the subject matter."

Stoops v. Smith, 97 Am. Dec. 76.

McFarland v. Sikes, 1 Am. St. Rep. 111.

We desire to prove what the real contract was.

We pray the opportunity to place before the jury the entire transaction with all the contracts

and all the facts and circumstances surrounding the parties.

We demand the right to put to the jury all the facts, and all the instruments and documents executed in connection with this transaction.

We urge that we are entitled to show the true intention of these parties as to this insurance.

We assert that we are entitled to establish that we had additional agreement with them in relation to the continuation.

We insist upon the right to prove the contemporaneous oral agreements made as an inducement, and that these constituted part of the consideration.

Miller v. Cas. Co., 193 Fed. 347.

"An oral contract of insurance, or an oral contract to issue a policy in future, is valid unless prohibited by statute."

Richards on Insurance Law, p. 102.

"The statute of frauds is not applicable to a contract of insurance, re-insurance or renewal." Ibid.

"It is often said that the doctrine of waiver and estoppel does not subvert the terms of the policy, and is not repugnant to the ordinary rules of evidence." Ibid, p. 162.

"In most instances waiver or estoppel must be established by parol testimony." Ibid p. 161.

"A company may make a valid renewal by parol even though the policy should stipulate that a renewal must be in writing." Ibid p. 318.

"Though the contract is said to be avoided by the violation on the part of the insured of any of

the conditions or warranties inserted for the benefit of the insurer, this means that the contract is voidable at the option of the insurer. The insurer, therefore, may waive the forfeiture and revive the contract or he may estop himself from taking advantage of the breach." Ibid p. 154.

"Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defense to avoid payment."

Mutual Life Ins. Co. v. Hill, 193 U. S. 551.

LIMITATION.

"Limitations of the time of bringing suit in contracts of insurance are not to be applied with the same degree of rigidity as statutes of limitation."

75 Fed. 365.

"The bank having suspended business on November 12th, 1891, but the cashier having continued in the service of the receiver until March following, when he resigned, HELD, that the services so rendered by him after November 12th were rendered to the bank none the less because its affairs were controlled by a receiver and the surety company was not absolved from liability for acts discovered more than six months from November 12th, but within six months from his resignation."

American Surety Co. v. Pauly, 72 Fed. 470. Syllabus.

"A provision in a fidelity bond indemnifying a bank against dishonesty of its cashier that it should be void if the bank failed to promptly notify the insurer in case any act of dishonesty came to its knowledge, did not become operative because the officers or directors of the bank learned of acts

of the cashier which were in fact dishonest if they were not known to be so at the time."

Syll. Aetna Indemnity Co. v. Farmers' Nat'l. Bank of Boyerton, Pa., 169 Fed. 738.

Roark v. City Trust etc. Co., 110 S. W. Rep. 1.

"Where the performance of conditions precedent are, without fault or laches on the part of the insured, rendered impossible by the acts of the insurer, or even by act of God or of the government or of the courts, such limitations are not to be applied. *Thompson v. Insurance Co.,* 136 U. S. 287; *Semmes v. Insurance Co.,* 13 Wall. 158."

75 Fed. 365.

"Although this form of insurance is of recent origin, it is now settled that the general rules of construction applicable to ordinary insurance policies are to be applied. *Mechanics' Sav. Bank v. Guarantee Co.,* 68 Fed. 459; *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York,* 11 C. C. A. 96, 63 Fed. 48. *The condition of an insurance policy of this kind providing for forfeitures is to be construed strictly against the company, and liberally in favor of the insured. Cotten v. Casualty Co.,* 41 Fed. 506. Limitations of the time of bringing suit in contracts of insurance are not to be applied with the same degree of rigidity as statutes of limitation. *Steel v. Insurance Co.,* 2 C. C. A. 463, 51 Fed. 715; *Thompson v. Insurance Co.,* 136 U. S. 299, 10 Sup. Ct. 1019. See also, May Ins. (2nd Ed.) Sec. 487; 2 Wood Ins. p. 1020."

Jackson v. Fid. & Cas. Co., 75 Fed. 365.

In the *Jackson case, supra,* a fidelity policy to a bank on its employe was involved, and the policy contained both the six months clause, and the one requiring a suit to be brought within a year. Neither

was complied with, and the Circuit Court of Appeals 5th Circuit, held, that under the circumstances the bond was not released.

"The authorities generally agree that it is competent for the parties to an indemnity bond to fix a period of limitation different from that provided by statute, and we think the better rule is that the limitation, if reasonable—and there is no reasonable excuse for delay in the commencement of the action—is binding upon the parties * * * To determine whether limitation upon the commencement of the action is reasonable, the bond, the contract, and the facts of the particular case must be considered together."

Ilse v. Aetna Indemnity Co., 69 Wash. 484.

"In this case, while the action was not brought within six months after the work was completed, there was evidence to the effect that the suit was delayed at the request of counsel for the surety company. The court heard this evidence and no doubt believed that state of facts. It follows, of course, that where there was a delay at the request of the surety company or its representatives, it cannot be heard to say that the action was not brought within time. In other words, the court properly found upon sufficient evidence that there was a waiver of both these provisions of the contract by the surety company."

Eilers Music House v. Hopkins, 73 Wash. 281.

The bank in the case at bar has not only pleaded that it was without laches or neglect, but that if this bond was not continued within the period required, it was wholly the fault and neglect of the Surety, and we are entitled to prove these facts just as they were proven in the *Jackson case.*

We believe the Honorable Trial Court wholly failed to grasp the purport of our pleading in this respect. He stated that the acts of the Surety which we pleaded, would constitute a different cause of action from the one we were pursuing, and that we should sue for a breach of the contract to renew the insurance.

"If there was any negligence here, the cause of action arose because of the act or failure of the company to do what it had agreed to do, and that would be another cause of action." (Tr. p. 118).

Bear in mind the Surety in its pleadings admits the execution and delivery of all the documents and the receipt of all the premiums. It then pleaded that no notice was given to it within six months after April 1st, 1913. (Tr. p. 47). It then pleaded that the execution of Exhibit "C" had been procured through misrepresentation (setting forth the misrepresentation) and that while it had been executed as of date April 1st, that it was actually executed on the 25th day of November. (Tr. pp. 48, 49).

It then pleaded that at the time of the execution of the bond and the various continuations, the bank agreed that it would from time to time make new and proper examination of the books to the end that any misconduct might be timely discovered. And then alleges that the bank failed to make the examinations as it had agreed to do. (Tr. p. 50).

In this connection we want to call attention to the fact that counsel for the surety in his argu-

ment to the court, laid much stress upon the point that it was essential that this six months forfeiture clause be enforced in order to compel these examinations to be made, and argued that if the examinations had been made according to agreement, the losses would have been discovered. The Honorable Trial Court seemed to assume that this matter of failure to examine was a fact established in the case. But there is not a word in the bond or any of the documents in the record about any examinations, and we denied that there was ever at any time any agreement that any examinations of this bank should be made, and there is nothing whatever in the record to show that examinations were not made.

The bank, replying to the above pleading, alleged that Exhibit "C" "was written and delivered by said defendant to the plaintiff as and of the 1st day of April, 1913, in pursuance of the agreement and arrangement between the parties hereto for the continuance in force of said fidelity insurance." (Tr. p. 53). "That same was written and delivered by the defendant to plaintiff as a part of and in pursuance with the agreement and arrangement existing between the parties hereto, * * * and for the consideration of the premiums paid and without any further or additional application having been made therefor." (Tr. p. 54).

"That there was a slight delay in the execution and delivery of said bond, but that said delay was caused by the neglect of defendant, and without

notice or knowledge on the part of plaintiff. That same was caused through no fault or neglect of plaintiff, but was caused wholly through the fault, carelessness and neglect of the defendant." (Tr. p. 54).

Negligence, which the Trial Court seemed to think we could urge only as a different cause of action, was pleaded as against the Surety's plea of delay in the execution of the renewal to show why it was executed in November but dated back to April 1st.

Certainly, if this matter of delay in the actual date of the execution of the continuation is material, we have the right to show that the delay was caused by the Surety, and not by the bank. Does not the very fact that Surety alleges that April first is not the true date, throw the whole transaction open to explanation?

The bank then further pleaded that while the Surety had full knowledge that all the officers of the bank were in Seattle, Washington, where its office was likewise located, did wrongfully, carelessly, negligently and knowingly take up the matter of continuing the bond with the "risk" Mitchell at Ketchikan, and did write to Mitchell and tender and offer to continue the insurance at the proper time and date. (Tr. pp. 54, 55).

Then further pleaded that as soon as the matter came to the attention of the bank, it took it up with the Surety and the Surety immediately recognized and admitted its oversight and neglect in the matter, and did voluntarily and forthwith

execute the instrument marked Exhibit "C" and made it operative from April first. (Tr. pp. 55, 56).

The bank therefore could not sue the Surety for failure to execute the extension, *because it did execute it.* It would be inconsistent for the bank to sue the Surety upon a breach of contract to continue when it has at all times alleged and now claims that the Surety did continue, and is therefore, in no position to take advantage of the six months forfeiture; that if there was a delay it was the delay of the surety, and therefore, it is estopped to claim the forfeiture. We are claiming that it was continued and that within a time and in a manner to fully avoid the forfeiture. Forfeitures are not favored.

Is not the pleading of the Surety in this case in the nature of confession and avoidance? It admits the execution and delivery of all the contracts but says it was defrauded. It admits the execution of the last continuance and that it provides for insurance from April 1st but says it was not actually executed until November. In other words, does it not all resolve itself into the question of whether or not the bank did, through misrepresentation, procure this last continuation?

When we stated in argument that we had authority to the point that the bond, although dated back, would take effect from its date, the Trial Court interrupted, saying, there could be no doubt about that, and of course, there is no doubt about

it. The Surety asserts that on the date of the actual execution of the continuation more than six months had already elapsed. If true, *it knew that fact at the time as well as the bank.* It not only must be held to have known it, because it was its own transaction, but the fact that it dated the renewal back to April 1st, proves conclusively that it not only knew it, but that it took it into consideration at the time and was willing to waive it. When the Surety, with the facts before it, made this contract effective from April 1st, it absolutely waived the six months forfeiture. It became, and is estopped to assert that the six months had already expired and that it is therefore entitled to the forfeiture.

Could there be a doubt of the right of the Surety and the bank on the 25th day of November, to have agreed to waive forfeiture if any existed and to continue the insurance uninterrupted? What evidence is there that such was not done. You will search in vain for such evidence in the instrument.

The Surety is here in this case pleading and asserting the right to show by parol evidence what the contract was at the time it executed the last instrument, and it having executed and delivered the instrument, and accepted the premium, the burden of proof is upon it to show that it is not what it seems.

May not the bank then have an equal right to show what the contract at that time actually was? The Surety was the first to plead that this instru-

ment was not what it purported to be, and was not the *real* contract. Is it not thereby estopped from saying that the bank may not show what was the real contract?

"A policy insuring against loss through dishonesty of an employe provided that as soon as any act of omission or commission of the employe should come to the knowledge of the employer, the latter should notify insurer. On October 12th, the employer wrote to the agent of the insurer and to the insurer, notifying them that the employe had absconded on September 26th, preceding, leaving a shortage of a specified amount. On the following day the agent of the insurer acknowledged receipt of the notice and requested the employer to send other information he might obtain. The correspondence between the parties, extending until April following, showed that the insurer only desired to know the amount of the liability. HELD, to show a waiver of any insufficiency in time of the notice of loss."

Syll. Roark v. City Trust, etc., Co., 110 S. W. Rep. 1.

"Waiver may be inferred from acts as well as words."

Pac. Mutual Life Ins. Co. v. McDowell, 141 Pac. 273.

This whole question on this branch of the case is one of the right of Surety to enforce a forfeiture.

"It being apparent that the bond sued on was prepared by the defendant, as to any ambiguity therein the provisions, conditions and exceptions of the bond which tend to work a forfeiture should be construed most strongly against the party preparing the contract. *French v. Fidelity & Casualty*

Co., 135 Wis. 259; *American Surety Co. v. Pauly,* 170 U. S. 133."

United Am. Fire Ins. Co. v. Am. Bonding Co., 131 N. W. 994.

"We think the two provisos referred to should be held to be conditions subsequent, which the defendant must plead and prove as part of its defense, if it relies on them to defeat the plaintiff's cause of action. *Redman v. Ins. Co.,* 49 Wis. 431, 4 N. W. 591; *Johnson v. Ins. Co.,* 94 Wis. 117, 68 N. W. 868." Ibid.

"In no other branch of fidelity insurance law has the 'doctrine of waiver' a wider or more important bearing than with reference to the subject of conditions and alleged breaches thereof. For no matter how great may have been the violation of the conditions on the part of the insured the right to avoid the policy by reason thereof may be waived by the insurer either directly or indirectly. * * * The question whether or not a breach of the condition of a policy has been waived or not, is ordinarily a question for the jury. *There is no necessity that the waiver should be in writing."*

Law of Guaranty Ins., Frosts' 2nd Ed., p. 261.

Rice v. Fidelity & Dep. Co., 103 Fed. 427.

American Surety Co. v. Pauly, 72 Fed. 470.

Aetna Indemnity Co. v. Farmers' Nat'l. Bank, 169 Fed. 738.

"Where an application for fire insurance is made and the terms thereof are agreed on between the insurer's authorized agent and the insured, and it is agreed that a policy embodying such terms shall be issued, the agreement is complete though credit be extended for the premium, and, where a policy is subsequently issued, it relates back to the time specified for the insurance to begin."

Roark v. City Trust etc. Co., 110 S. W. Rep. 1.

"In an action on a bond to make good loss by embezzlement of an employe, a plea seeking to avoid the bond as procured by misrepresentations as to the previous state of his accounts by the employer, averred that the employe was then a defaulter and that the employer knew it, or could have known it by the exercise of diligence. Held, that this was bad, as a double plea."

Supreme Council Cath. Knights of Am. v. Fid. & Cas. Co., 63 Fed. 49.

"While liability under a surety bond for honesty of an employe would be defeated if the loss was due to neglect of the employer to take the precautions required by the bond, the condition is subsequent and not precedent, and there is no occasion for an averment in respect thereto; it is a matter of defense that must come from the other side, upon whom the onus rests. * * *

"The mere fact that the examination, if made by a reasonably competent person, failed to discover discrepancies covered by false entries and bookkeeping devices, would not defeat renewals of the policy."

Title Guaranty & Surety Co. v. Nichols, 224 U. S. 346.

"It is urged by counsel for plaintiff in error that the promises and agreements on the part of the insured to exercise and maintain over the employe such a supervision as contemplated in his bond of indemnity was not observed; hence, there has been a breach of the bond on the part of the insured. Unless there was a substantial compliance with these undertakings, the conclusion urged by counsel would probably be true. However, in such breach the burden of proof would rest on the insurer. *United States Fidelity Co. v. First Nat. Bank,* 233 Ill. 475, 84 N. E. 670; *Perpetual B. & L. Soc. v. U. S. Fid. & Guar. Co.,* 118 Iowa 729, 92 N. W. 687; *Bank of Tarboro v. Fidelity & Dep. Co.,*

128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; *T. M. Sinclair & Co. v. National Surety Co.,* 132 Iowa 549, 107 N. W. 184; *Jones v. Accident Asso.,* 92 Iowa 658, 61 N. W. 485."

Southern Surety v. Tyler & Simpson, 120 Pac. 938.

In the light of this authority we again challenge the attention of the Court to the fact that there is nothing in any of the contracts here requiring examinations. Since so much has been made of that point as a reason for enforcing the forfeiture, we cite these authorities upon the point that it is in no event a condition precedent, if they should prove the facts which they have alleged at the trial, and would not therefore justify the forfeiture.

"The insured under a fidelity bond is not required to aid the insurer in determining the desirability of the contract of indemnity, nor to warn him against risk where all the facts are as accessible to the one as to the other, whether the insurer be present or absent, unless the circumstances of the case are such that silence on the part of the insured would amount to an intentional deception or fraud. *Sherman v. Harbin,* 100 S. W. 629."

Law of Guaranty, Frost, p. 307.

"If it had desired a more frequent examination, it had the power to require the same; but, having continued its bond from time to time upon said representations and for the consideration paid by the bank, it is now estopped to deny liability on the ground that the examinations were made, at periods more extended than originally contemplated."

U. S. Fid. & Guar. Co. v. Boley Bank, 144 Pac. 615.

"Where a surety company has continued in force, from year to year, its bond indemnifying a bank against pecuniary loss by reason of the dishonesty of its cashier, upon representation by the Bank that the books and accounts of such cashier were examined from time to time in the regular course of business and found correct, such surety company is estopped to deny liability by reason of the fact that such examinations were made at periods more extended than those provided for in the original application for the bond." Ibid.

"Mere negligence on the part of the obligee in failing to discover the defaults of the employed will not release the surety. It does not in any case apply to mere breaches of duty or of contract obligations on the part of the employed, not involving dishonesty on his part or fraudulent concealment on the part of the insured."

Frost's 2nd Edition, p. 183.

"It appears that the cashier, Strong, *successfully secreted his defalcations from these men, notwithstanding the fact that they made a reasonably diligent investigation from month to month. The fact that he did succeed in thus hiding his wrongdoing for a time does not demonstrate that the members of the committee failed to perform their duty. If that process of reasoning should be followed out, it would necessarily defeat the objects of the bond. It was from just such a condition of affairs that the bank sought indemnity.* As has been well said *'an employer would need no insurance against that close and relentless vigilence which makes stealing impossible.'* Hammond, J., in *Guarantee Co. v. Mechanics' Bank*, 80 Fed. 766, 26 C. C. A. 146."

American Bond Co. v. Morrow, 117 Am. St. Rep. 76, 77.

"The business honesty or fidelity insured by such contracts as these is not that kind of enforced

honesty which comes of a want of opportunity to be dishonest, but that which is to be sturdy enough to operate for safety, spite of opportunity and temptation. That is the only kind of insurance worth the premium paid by the assured, or which is a fair consideration for the risk of loss which he opens under the protection of the guaranty, and in the absence of evidence to the contrary, presumably that which is bargained for in each instance; a kind of honesty which will not take advantage of lapses of watchfulness to construct deceitful appearances adjusted to familiar traits or habits of carelessness on the part of the employer, *perhaps indulged because of reliance upon the insurance which he has accepted as a protection.*"

Guarantee Co. v. Mechanics' Sav. Bank, 80 Fed. 766.

"It is that which the obligee would naturally seek for his protection, always desiring presumably, to provide by some such guaranty even against his own negligence and careless business habits. The nature of the risk forbids the idea of any implicit or general limitations upon the guarantee against loss by dishonesty, and, in our judgment, these contracts are not to be construed as imposing any mere inference of an understanding between the parties that the business will be conducted with either ordinary or any degree of diligence or prudence as to watchfulness." Ibid.

"Up to that time in this, as in other cases of a like nature, the employe had concealed his embezzlements, and the fact that the bank officials did not immediately discover that the institution was being robbed is not a fact, in itself, sufficient upon which to predicate the contention that they failed in the performance of their duty in examining his books and accounts, amounting to a breach of their alleged warranty in this regard."

U. S. Fid. & Guar. Co. v. Boley Bank, 144 Pac. 617.

"It is pertinent to remark that if the bank was left under an active duty of vigilance as to supervision of habits or inspection of accounts with a view to prevent fraud, there would be little or no motive to secure and pay for insurance like this."

Mechanics' Sav. & Trust Co. v. Guarantee Co., 68 Fed. 465.

"It is true that the bank could have discovered Phillips' shortage if it had checked up the books of the bank with that object in view; but the suspicions of the officers of the bank had never been aroused."

Fid. & Dep. Co. v. Guthrie Nat'l. Bank, 17 Okla. 397.

"Comparatively few human transactions would stand an after-event test."

Mechanics' Sav. & Trust Co. v. Guarantee Co., 68 Fed. 466.

"It is not probable that any examination the bank would have caused to be made would prove satisfactory as looked at after the facts are all known, unless the same had detected Schardt." Ibid.

"It is not difficult after a disaster has occurred to look back and criticize freely." Ibid.

"The object of an indemnity bond is to indemnify, and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose and becomes worse than useless. It is worthless as actual security and misleading as a pretended one. *Bank of Tarboro v. Fidelity & Dep. Co. of Md.,* 128 N. C. 366, 83 Am. St. Rep. 682."

Southern Surety Co. v. Tyler & Simpson, 120 Pac. 939.

In *Phoenix Insurance Co. of Brooklyn v. Guarantee Co. of N. America,* 115 Fed. 964, the Circuit Court of Appeals, in considering one of these bonds where a forfeiture was claimed, said that the bank was not required to employ somebody to watch its cashier all the time, and said, "if it had undertaken to do this, it would not have needed a bond of indemnity."

"Certificate made upon renewal of a bond that books were examined and found correct is not a warranty."

Hunter v. U. S. Fid. & Guar. Co., 167 S. W. 693.

That was an action against this same company, upon this same bond, in which the same defense was set up in an effort to defeat the bond. See also, 224 U. S. 353.

"It is now well settled that the bond of the surety company, like any other insurance policy, is to be most strongly construed against the insurer. The language of the bond is that selected and employed by the insurer, and when doubtful or ambiguous, must be given the strongest interpretation against the insurer, which it will reasonably bear."

Amer. Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72.

"In an action against the maker of a bond given to indemnify or insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, if the bond was fairly and reasonably susceptible of two constructions, one favorable to the bank and the other to the insurer, the

former, if consistent with the objects for which the bond was given, must be adopted."

Syllabus. *Amer. Surety Co. v. Pauly,* 170 U. S. 133.

See also:

Champion Ice Mfg. Co. v. Am. Bond. & Tr. Co., 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356.

Title Guaranty & Sur. Co. v. Bank of Fulton, 89 Ark. 471, 117 S. W. 537.

Bank of Tarboro v. Fid. & D. Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

French v Fid. & Cas. Co., 135 Wis. 259, 265, 115 N. W. 869.

Redman v. Ins. Co., 49 Wis. 431, 435, 439; 4 N. W. 591.

Johnson v. Ins. Co., 94 Wis. 117, 119; 68 N. W. 868.

Roark v. City Tr. Safe Dep. & Sur. Co., 110 S. W. Rep. 1.

"'There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank:' *Travelers' Insurance Company v. McConkey,* 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. ed. 308; *First National Bank v. Hartford Fire Ins. Co.,* 95 U. S.

673, 24 L. ed. 563; *Reynolds v. Commerce Fire Insurance Co.,* 47 N. Y. 600; *Bank of Tarboro v. Fidelity & Dep. Co. of Md.,* 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; *Champion Ice Mfg. & C. S. Co. v. Amer. B. & Tr. Co.,* 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356; *Remington v. Fidelity & Dep. Co. of Md.,* 27 Wash. 429, 67 Pac. 989; *U. S. Fidelity & G. Co. v. First Nat. Bank,* 233 Ill. 475, 84 N. E. 670; *American Bonding Co. v. Spokane Bldg. & L. Soc.,* 130 Fed. 737, 65 C. C. A. 121; *Aetna Indemnity Co. v. Crowe Coal & Mining Co.,* 154 Fed. 545, 83 C. C. A. 121; *Livingston et al. v. Fidelity & Dep. Co. of Md.,* 76 Ohio St. 253; 81 N. E. 330; *Guthrie Nat. Bank v. Fidelity & Dep. Co. of Md.,* 14 Okla. 636, 79 Pac. 102, Id. 17 Okla. 397, 87 Pac. 300."

Southern Surety Co. v. Tyler & Simpson Co., 120 Pac. 938.

See also:

Mechanics' Sav. Bank & Tr. Co. v. Guaranty Co., 68 Fed. 462.

Aetna Indemnity Co. v. Crowe Coal & Min. Co., 154 Fed. 555.

Cowles v. U. S. Fid. & Guaranty Co., 32 Wash. 120.

"It seldom occurs that embezzlement or larceny is detected within three, six or twelve months after committed, especially if the employe has been in the service of his employer for some time and is trusted by him, and is shrewd."

U. S. F. & G. Co. v. Bank of Monticello, 143 S. W. p. 998.

We pleaded and stated to the jury that the business of this bank was to be transacted at Ketchikan, Alaska, six hundred miles away from Seattle, the home office of the bank, and that the Surety

at all times had knowledge of this fact; that it wrote the bond knowing these facts, and knew just how the business was to be conducted, and the Surety at all times knew that to make such examinations as it now contends should have been made, was impracticable and impossible, and that it would be unreasonable to expect that any such examinations as it now alleges, could or would have been made. That the Surety, well knowing and understanding all of the above and foregoing facts and conditions, and the manner in which the business was to be conducted, did write and deliver such bond and continuations, and accept the premiums therefor, etc. (Tr. pp. 56, 57).

"But however this may be, the object of the contract being to afford an indemnity against loss, it should be so considered as to effectuate this purpose, rather than in a way which will defeat it * * * *Bray v. Insurance Co.,* 139 N. C. 390, 51 S. E. 922; *Railroad Co. v. Casualty Co.,* 145 N. C. 116, 58 S. E. 906; 19 Cyc. 655; *W. F. Ins. Co. v. Simons,* 96 Pa. 520; *Rogers v. Aetna Ins. Co.,* 95 Fed. 103, 35 C. C. A. 396; *Insurance Co. v. Kearney,* 180 U. S. 132, 21 Sup. Ct. 326, 45 L. ed. 460; *F. C. Ins. Co. v Hardesty,* 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; *S. F. & M. Insurance Co. v. Wade,* 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870; *Vance on Insurance,* p. 429."

Crowell v. Maryland Motor Car Ins. Co., 85 S. E. 37.

"The defendant's expert evidence tended to show that if the returned vouchers or the reconciliation reports of such banks had been compared with the ledger accounts, the discrepancy would have

appeared. But the cashier was cunning, and he testified to the difficulties which he threw in the way of any effort to verify the books in these particulars."

Surety Co. v. Nichols, 224 U. S. 352.

"It is said that this statement was untrue, inasmuch as at the date of such renewals the books and accounts were not correct and the cashier was short in his cash. But the certificate is not to be taken as a warranty of the correctness of the accounts. The statement is that his books and accounts had been examined and found correct. The mere fact that the examination, if made by a reasonably competent person, failed to discover discrepancies covered up by false entries, or other bookkeeping devices, *would not defeat the renewal."* Ibid. 353.

"The question of the weight or credibility of the evidence is not one for our consideration. There was some evidence which the trial judge thought sufficient to carry the case to the jury." Ibid.

The bank's duty under these several contracts in this case was confined to the observance of good faith and fair dealing, and *the burden of proving to the contrary was upon the Surety.*

"At the time appellant issued this insurance it knew that the bank was what is called 'a country bank,' and that the officers of it were men who probably could not give the accounts an expert examination."

U. S. Fid. & Guar. Co. v. Citizens National Bank, 143 S. W. 999.

"Who are referred to in the brief as 'ignorant and incompetent negroes,' it may be said that they were the persons with whom defendant contracted in the first instance, and it must be charged with

a knowledge of their race, their intelligence and business capacity. The fact is notorious that Boley is a negro town in which no white man has ever lived, or desired to live."

U. S. Fid. & Guar. Co. v. Boley Bank, 144 Pac. 615.

So in this case, the same company is charged with knowledge that the bank was located at a great distance, in a sparsely settled community, where experts are not available and no officer of bank was there to watch or check Mitchell; that Mitchell would be in absolute and sole charge and control, and with the further fact that no special examinations were at any time promised or guaranteed, and without having requested any special examinations, it continued to extend the insurance and accept the premiums, and at the time of renewals, did not even take an application, nor ask for information.

"It was upon these certificates that the bond *was renewed and continued in force.* * * * If it had desired a more frequent examination, it had the power to require the same."

U. S. Fid. & Guar. Co. v. Boley Bank, 144 Pac. 617.

"The person insured in a policy of fidelity insurance is not, perhaps, held strictly to the duty of disclosing all conditions material to the risk, as in the case of ordinary insurance, because the insured and the insurer stand upon a plane of equal opportunity for information."

Am. St. Rep. Vol. 100, p. 780.

"Insurer and insured in a fidelity insurance bond, being upon a plane of equal opportunity

for information, the insured is not held strictly to the duty of disclosing all the conditions material to the risk, as in the case of ordinary insurance."

Guarantee Co. of N. A. v. Mechanics' etc., 80 Fed. 767.

"It has been claimed frequently, and sustained by courts of acknowledged eminence, that in respect to such matters as are here being considered the insurer and the insured stand upon a plane of equal opportunity for information."

Law of Guaranty Insurance, Frost's 2nd Ed., p. 280.

"In short, if we give the alleged warranties the scope which the defendant claims should be given to them, no bond of indemnity would ever be taken out by an employer."

Southern Surety Co. v. Tyler & Simpson Co., 120 Pac. 939.

"An insurance contract will be construed to avoid a suspension of liability or a forfeiture and to sustain rather than defeat its purpose, when that can be done without violence to the language employed."

Mathews Farmers' Mutual v. Moore, 108 N. E. 155.

We assert with confidence that, under the above decisions the bank would have the right to show that it was not guilty of any negligence or laches in not making discovery within the six months, and that therefore the company may not claim this forfeiture, even though the last continuation has never been issued.

In the case of *United States Fid. & Guar. Co.*

v. Citizens National Bank of Monticello, 143 S. W. 997, the continuation certificates were the same which the company used in this case.

The language in the bond as to renewals and continuations is exactly the same, it being the same company.

In that case the original written application contained the following:

"And I hereby agree for myself, my heirs and administrators, in consideration of the United States Fidelity & Guaranty Company becoming Surety for me, and issuing the bond of security hereby applied for, *or any renewal thereof, or any further or other bond of security hereby issued by the said company on my behalf,*" etc.

In that case in the employer's statement following the application, is the following language:

"It is agreed that the above answers are to be taken as a basis for the said bond applied for, *or any renewal or continuation of the same* that may be issued by the United States Fidelity & Guaranty Company to the undersigned, upon the person above named."

Since this is the same company, the same bond, and the same continuation certificate, it is only natural to assume that the same statements are contained in the written application and the employer's statement. As we have pointed out, the bond recites that a written application has been given, and that an employer's statement has been taken, and before the court can, as a matter of law, say that the provisions of this written application and of the employer's statement do not jus-

tify and prove our contention that it is a continuous contract, it must have before it *all of the contract,* and these can only be brought into the record by introducing them in evidence at a trial, which we humbly pray this court to give us.

We have quoted above the renewal certificate in the *De Jernette Case.* In that case they were called "renewal certificates." In the case at bar the contracts issued from year to year are not called "renewal certificates," but are in the contracts themselves denominated "continuation certificates." (Tr. p. 28). The designation being "Continuation Certificate No. T-450." "Continuation" is much stronger than "renewal." The word "renewal" may be construed to signify to make new again. That is, to free from the requirements and limitations attached to that whose place it takes. On the other hand, the word "continuation" implies continuity of existence. When the Surety, by means of "continuation certificate," continued in force the bond, it continued in existence and prolonged the life of that bond.

It was a part of the scheme to advertise on the part of this company, that it was offering to the bank in soliciting its business, a CONTINUING POLICY. This form of continuous insurance has become popular, and its superiority is emphasized by experience. Employes of banks are usually expert bookkeepers and accountants, and if they set their heads to steal, they can do so in spite of the most vigilant watching, and in a majority

of cases, detection occurs only after the stealing has been going on for a period of time. Frequently, for a term of years, and it is usually discovered because the thief eventually grows somewhat confident and careless, or because he goes on a vacation, or some unexpected event throws light into a hidden nook or cranny.

Because of this fact, and of the difficulty and delay in detection of such employes, employers do not want short-lived policies, and so the system of continuation of the insurance contract developed, and consequently, the insurance companies in their keen competition for business with an educated and discriminating insuring public, advertised and emphasized this feature of continuing insurance. And, undoubtedly catering to this wish and demand on the part of the banking world, the last continuation in this case is made without limitation, and is to continue in force until terminated by notice.

Look again at the "continuation certificate." (Tr. p. 28). At the close it reads: "Subject to all the covenants and conditions of said original bond heretofore issued, *dating from* the 1st day of April, 1906." The particular certificate copied was dated April 1st, 1910, but note the insurance dates from April 1st, 1906, and it so states in this continuation certificate. This language is in each of the continuation certificates. It is, therefore, very clearly shown from the certificates that it was intended that the continuing guaranty should run *from* the date of the original bond, April 1st, 1906,

and cover the entire period of time from that date until the end of the period for which such continuation certificate is issued, and it seems equally clear, taking all the papers together, that it was the intention and expectation of both parties that the continuation certificates issued from year to year would continue the bond in force so as to cover any loss that might accrue during the entire period, as though the bond itself had so specifically provided.

This is the only reasonable construction, as the continued liability remains the same in dollars and cents, while if each year is to be taken as a new and independent contract, then the full penalty of the bond, if necessary, would stand to indemnify any loss for each year, and if $25,000 were stolen during each year, it would thus become cumulative, and the company might become liable for five times the bond penalty, if there had been a $25,000 stealing in each of the five years. Certainly the company does not want that construction placed upon its continuing contracts of insurance.

The fact that while such contracts were undergoing judicial construction, the company adopted the plan of continuing without restriction its contracts, and the further fact that it issued continuations instead of the old "renewal contracts," shows an evident intention of making change in the character of its contracts, and the change intended to be made could be no other than that from the system of restricted renewals which the courts had con-

strued into a separate and independent contract for each year, into a CONTINUING GUARANTY, to run so long as the insured was willing to pay the premium, and as it should determine to accept the same.

The renewal receipt in the *De Jernette case,* and the continuations in this case are so radically different that there can be no kinship in the principle governing their construction.

"When a bond guaranteeing the fidelity of an employe is renewed, there is still only one contract and one penalty, the renewal certificate being a new bond only in extending the indemnity provided by the original bond to a new period of time."

First National v. U. S. Fid. & Guar. Co., 110 Tenn. 10.

We respectfully submit the cause should be reversed and remanded.

JOHN W. ROBERTS,
GEORGE L. SPIRK,
WILLIAM H. METSON,
Attorneys for Plaintiff in Error.

METSON DREW and MACKENZIE,
of Counsel.